TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 80.

FRANKLIN S. JEROME, PLAINTIFF IN ERROR,

vs.

CHARLES P. COGSWELL, THE STATE SAVINGS BANK, ET AL.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

FILED JULY 17, 1905.

(19,847.)

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of Circuit Court of Connecticut.]

The President of the United States to the Supreme Court of Errors of the State of Connecticut:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said Supreme Court of Errors of the State of Connecticut, before you, at the April term, 1905, in the Second Judicial District, New London County, thereof, between Charles P. Cogswell, State Savings Bank, Collinsville Savings Society, Falls Village Savings Bank, Stafford Savings Bank, Guilford Savings Bank, Windham County Savings Bank, Waterbury Savings Bank, and Southington Savings Bank, claimants, appellants, *versus* Franklin S. Jerome, D. L. Underwood, Andrew Radel, Ira L. Peck, H. H. Gallup, R. W. Perkins, Stonington Savings Bank, and M. Eugene Lincoln, claimants, appellees, in the case of Charles P. Cogswell *vs.* Second National Bank, Lewis Sperry, Receiver, a manifest error has happened, to the great damage of the said defendant, Franklin S. Jerome, as by his complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, D. C., and filed in the office of Clerk of the United States Supreme Court on the 19th day of July, A. D. 1905, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

2 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of June, 1905.

Done in the City of Hartford, with the seal of the Circuit Court of the United States for the District of Connecticut attached.

E. E. MARVIN,
Clerk Circuit Court United States,
District of Connecticut.

Allowed June 20th, 1905.

DAVID TORRANCE,
Chief Justice of the Supreme Court of Errors
of the State of Connecticut.

Received and filed this 21st day of June, A. D. 1905.

JOHN C. AVERILL,
Clerk of the Supreme Court of Errors, 2nd Judicial District, State of Connecticut.

3 [Endorsed:] United States Supreme Court. Frank S. Jerome, plaintiff in error, *vs.* Charles P. Cogswell *et al.*, defendants in error. Writ of error from U. S. Supreme Court to Supreme Court of Errors of State of Connecticut. Donald G. Perkins, Norwich, Conn., att'y for plaintiff in error.

4 To all whom these presents shall come, greeting:

Know ye, That I, John C. Averill, Clerk of the Supreme Court of Errors of the State of Connecticut, in and for the Second Judicial District, in said State, having inspected the Files and Records of said Court, in my custody, do find there remaining on file a certain record in an appeal taken by Charles P. Cogswell, *et al.*, appellants and in which Franklin S. Jerome, *et al.* were appellees, in a cause wherein Charles P. Cogswell was Plaintiff and The Second National Bank, Connecticut was Defendant, Lewis Sperry, Receiver, in the words and figures following, to wit:—

5 Supreme Court of Errors, Second Judicial District, New London County, April Term, A. D. 1905.

New London County, Norwich, March 29, 1905.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

Stipulation.

Charles P. Cogswell, The State Savings Bank of Hartford, and others, having taken an appeal from the judgment rendered in said cause by the Superior Court (Gager, Judge), to the Supreme Court of Errors to be held within and for the Second Judicial District on the last Tuesday of April, 1905, it is hereby agreed by the undersigned parties to said appeal that if the Court approve, the proceedings in said cause prior to the application to cite in claimants to the fund referred to in the judgment rendered by said Gager, Judge, need not be printed, but that the printed record of the Supreme Court of Errors in the defendant's appeal in said cause taken to said court at its October Term, 1903, for said Second Judicial District, may be used on the trial in the Supreme Court; and it is also agreed, if the Court approve, that the notice of appeal by said Cogswell and one of the banks, and that the reasons of appeal filed by said Cogswell and the reasons of appeal filed by one of the banks shall be printed with the statement that the other notices of appeal and reasons of appeal

filed by the other appellants were filed in due time and are the
6 same in similar form as the notice and the reasons of appeal filed by said bank.

CHARLES P. COGSWELL,
THE STATE SAVINGS BANK,
THE COLLINSVILLE SAVINGS SOCIETY,
THE FALLS VILLAGE SAVINGS BANK,
THE STAFFORD SAVINGS BANK,
THE GUILFORD SAVINGS BANK,
THE WINDHAM COUNTY SAVINGS BANK,
THE WATERBURY SAVINGS BANK,
THE SOUTHINGTON SAVINGS BANK,
Appellants,

By F. T. BROWN, *Their Attorney.*

D. L. UNDERWOOD,
ANDREW RADEL,
IRA L. PECK,
H. H. GALLUP,
R. W. PERKINS,
THE STONINGTON SAVINGS BANK,
M. EUGENE LINCOLN,
F. S. JEROME,
Appellees.

By BROWN & PERKINS AND
WM. H. SHIELDS, *Their Attorneys.*

Superior Court, New London County, October 30th, A. D. 1903.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

To the Honorable Superior Court, now in session at Norwich, within and for the County of New London:

The undersigned Lewis Sperry, Receiver of the defendant bank, respectfully represents to this court, that on the 24th day of May,
7 1900, the capital stock of said bank was reduced from $300,000 to $200,000, that at the time of said reduction and in connection therewith, assets of said bank of the face value of $101,000 were charged off and set aside; and that a question has arisen as to whether the proceeds of said assets shall be distributed to the stockholders of record at the time of said reduction of said capital stock or whether they shall be distributed to the present stockholders of said bank; wherefore the undersigned asks that an order be made requiring all such stockholders of record at the time of said reduction and all stockholders now of record to appear, if they see cause, on a day fixed by said court and to be heard relative to the ownership and distribution of said charged off assets.

LEWIS SPERRY, *Receiver.*

Filed Oct. 30, 1903.

JOHN C. AVERILL, *Clerk.*

Superior Court, New London County, October 30th, A. D. 1903.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

Order of Notice.

Upon the application of Hon. Lewis Sperry, Receiver of the defendant bank, asking for an order of notice to all the stockholders of said bank of record on May 24th, 1900, the date of the reduction of the capital stock of said bank, and also to all the present stockholders of record to appear if they see cause, and be heard regarding the ownership and distribution of certain assets of said bank charged off at the time of said reduction of capital stock; it is ordered that all said stockholders be heard by this court on Friday, the 20th day of Nov., A. D. 1903 at 10 a. m. at the Superior Court Room in Norwich, in relation to their claim if any to the ownership and distribution of said charged off assets, and that said Lewis Sperry, receiver, as aforesaid, give notice of this order by mailing by registered letter on or before Nov. 6th, 1903, a copy of this order to each of the stockholders of said bank of record at the time of said reduction of capital, viz: May 24th, A. D. 1900, and to each of the present stockholders of record.

By the Court.

JOHN C. AVERILL, *Clerk.*

Filed Oct. 30, 1903.

JOHN C. AVERILL, *Clerk.*

Superior Court, New London County, October 30th, 1903.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

Order of Notice.

Upon the application of Hon. Lewis Sperry, Receiver of the defendant, in the above entitled cause, asking this court for an order, limiting the time within which claims must be presented against said defendant bank by the creditors thereof; it is ordered that one month from this date is limited and allowed within which the creditors of said bank may present their claims to said receiver at the office of Solomon Lucas in the City of Norwich, and unless such claims are presented within such time, they shall be forever barred; it is further ordered that copies of this order of limitation be published in the Morning Bulletin and Norwich Evening Record, Daily papers published in the city of Norwich, in said County, daily for one week, commencing the 2nd day of Nov., A. D. 1903; and said receiver also

mail on or before the 7th of Nov., A. D. 1903, written or printed copies of this order to all known creditors of said bank.

By the Court.

JOHN C. AVERILL, *Clerk.*

Filed Oct. 30, 1903.

JOHN C. AVERILL, *Clerk.*

9 Superior Court, New London County, Nov. 6th, A. D. 1903.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

To the Honorable Superior Court, now in session at Norwich, within and for the County of New London:

The Application of Hon. Lewis Sperry, receiver of the defendant in the above entitled cause, respectfully represents, that by a misunderstanding on the part of the proprietors of the Norwich Morning Bulletin, the order of notice directed by this court on the 30th day of October, A. D. 1903, to be published in said paper daily for one week, commencing the 2nd day of Nov., A. D. 1903, was only published once, namely: on the 2nd day of Nov., A. D. 1903; he, therefore asks this court that a further order of notice may issue that said notice be further published in said Norwich Morning Bulletin, by reason of the aforesaid unintentional omission.

LEWIS SPERRY, *Receiver.*
By His Attorney, SOLOMON LUCAS.

Filed Nov. 6, 1903.

JOHN C. AVERILL, *Clerk.*

Superior Court, New London County, Nov. 6, A. D. 1903.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

Order of Notice.

Upon the Application of Hon. Lewis Sperry, Receiver of the defendant in the above entitled cause, asking this court for an order limiting the time within which claims must be presented against said defendant bank by the creditors thereof, it was ordered on the 30th day of October, A. D. 1903, that one month from that date
10 be limited and allowed within which creditors of said bank might present their claims to said receiver at the office of Solomon Lucas in the city of Norwich, and unless such claims were presented within such time, they should be forever barred. It is further ordered by this court that notice of said order of limitation be published in the Norwich Morning Bulletin, a daily paper pub-

lished in the city of Norwich, in said County, daily for five days, commencing the 9th day of November, A. D. 1903.

By the Court.

JOHN C. AVERILL, *Clerk.*

Superior Court, New London County, December 10th, 1903.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

To the Honorable Superior Court, now in session at Norwich, within and for the County of New London:

The undersigned, Lewis Sperry, receiver of the defendant bank, hereby makes return that, upon the order of this court dated October 30th, 1903, directing that notice be given to creditors of said bank to present their claims by mailing copies of said order to all known creditors on or before November 7th, 1903, and by publishing the same in the Norwich Morning Bulletin and Norwich Evening Record daily for one week, commencing November 2nd, 1903, he mailed a written or printed copy of said order to every known creditor of said bank on or before November 7th, 1903, and also published a copy of said order in the Norwich Evening Record daily for one week commencing November 2nd, 1903, but that by mistake of the managers of said Morning Bulletin publication was not made in said Bulletin in accordance with said order, but only one day; that upon representing said fact to this court, this court on November 6th, 1903, ordered that a copy of said order of limitation be published in said Bulletin daily for five days commencing November 9th, 1903, and that, in pursuance of said further order, the undersigned caused to be published a copy of said order in said Norwich Morning Bulletin, daily for five days, commencing the 9th day of November, 1903.

LEWIS SPERRY, *Receiver.*

Filed Dec. 11, 1903.

JOHN C. AVERILL, *Clerk.*

Superior Court, New London County, December 10th, 1903.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

To the Honorable Superior Court, now in session at Norwich, within and for the County of New London:

The undersigned, Lewis Sperry, receiver of the defendant bank, hereby makes return that, upon the order of this court dated October 30th, 1903, fixing a date for a hearing as to the ownership of certain assets of said bank charged off at the time of the reduction of the

capital stock, and directing him to give notice of said order by mailing by registered letter on or before November 6th, 1903, a copy of said order to each of the stockholders of record at the reduction of capital and also of those of record at the date of said order, he mailed, by registered letter, a copy of said order on or before November 6th 1903, to each of the stockholders of said bank of record on May 24th, 1900, and to each of the stockholders of record on October 30th, 1903.

LEWIS SPERRY, *Receiver.*

Filed Dec. 11, 1903.

JOHN C. AVERILL, *Clerk.*

12 Superior Court, New London County, December 22nd, A. D. 1903.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

Report of Lewis Sperry, Receiver.

To the Honorable Superior Court within and for the County of New London:

The undersigned, Lewis Sperry, Receiver of the defendant, respectfully represents to this honorable court:

1. That in addition to the property contained in the schedule of property received by the undersigned from the administrator of the estate of Charles W. Carter deceased, the temporary receiver of said bank, there are belonging to said bank, two promissory notes, one for $2,500.00, made by the Ball Check Light Company, endorsed by D. M. Compton, due June 9th, 1903; and the other is a participation note of A. L. Meyer, due July 17th, 1903, for $3,333.33; the two amounting to $5,833.33 on their face, and both are in the Old National Bank of Providence, R. I. for collection. These notes, not having been received from said administrator, were unintentionally omitted in the Inventory filed by me.

2. The President of said Old National Bank informs me that these notes are not collectible at present, but that he believes they will be paid, if time is given.

3. There is now on deposit in the Merchants National Bank in this city to my credit the sum of $30,806.82.

4. In addition to the sum received by me from said administrator, as set forth in said schedule, viz: $16,521.48, I have collected of the following persons the following sums of money which are
13 included in said deposit in the Merchants National Bank, namely:

1903.			
July	24th.	Amount received from P. E. Hendrick on the Curren note	$125.00
July	28th.	Amount received from C. E. Brady	200.00
Nov.	3rd.	1 coupon collected	25.00
"	4.	Cash of Isaac G. Avery	100.00
"	13.	Cash of Isaac G. Avery	100.00
"	13.	Balance due on Charles E. Brady's note	188.24
"	18.	Cash of Philip E. Hendrick	65.00
"	21.	Cash of John Manwaring, Jr., Lewis Ford's Note:	
		Face	150.00
		Interest	6.00
		C. W. Roode's note, face	100.00
		Interest	3.60
		Received of him to apply on the Rix note	3.57
		3 coupons on Crawfordsville bond, $2.50 each	7.50
		Old check collected on account of George L. Raymond's note	8.00
Dec.	2.	Received of A. T. Gardner on F. C. Atchison note	100.00
"	7.	Balance on Rix note	145.49
		Arthur C. Chapman's note, face	135.00
		Interest	3.51
		A. N. Fetherson's note, face	150.00
		Interest	2.25
Dec.	11.	Received of Philip E. Hendrick, balance on Curren note	65.00
14			
Dec.	12.	Received of Isaac G. Avery, balance due	293.44
		Received of the Owaneco Silk Co.	11,631.31
		One draft	18.72
Oct.	28.	Received from	188.00
Nov.	10.	Received from	1.52
Dec.	15.	Received from	197.74
Dec.	19.	Received from A. T. Gardner	20.75
Dec.	22.	Received from	250.70
			$14,285.34

5. There has been collected by said bank of the assets that were set apart or charged off at the time of the reduction of the capital stock of said bank the sum of $14,490.70.

6. The above sum deposited in the Merchants National Bank is deposited there under an arrangement made by me with the bank that interest should be allowed thereon at the rate of 3 per cent. per annum.

7. I have paid to Truman G. Edwards out of my own private funds the sum approved and authorized by this court by its order dated Oct. 30th, 1903, $393.50; also the sum of $35.00 to the Surety

Company, my bondsman as such receiver. The above sums should be deducted from the amount now deposited in the bank.

8. All the stockholders of record at the time of the reduction of the capital stock and all the present stockholders of record have received the notice directed to be given by this court, except the following named persons, the notices to which have been returned to me unclaimed, namely: Ida E. Babcock, 819 Park St., Hartford, Conn., William Babcock, Roberts Building, Hartford, Conn., Elvina L. Colburn, Worcester, Mass., Elisha Fitch, Montville, Conn., Edwin M. Fitch, c/o A. B. Herman, Flagstaff, Arizona, Maria W. Turner, Hanover, Conn, Frank F. Webb, Willimantic, Conn.

Dated at Norwich, December 22nd, A. D. 1903.

LEWIS SPERRY, *Receiver.*

Filed Dec. 23, 1903.

JOHN C. AVERILL, *Clerk.*

Allowed by the Court, Dec. 23, 1903.

Superior Court, New London County, December 23rd, 1903.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

Application for an Order to Declare a Dividend.

To the Honorable Superior Court now in session within and for the County of New London:

The undersigned, Lewis Sperry, Receiver of the defendant bank and of the charged off or set aside assets of said bank, respectfully represents that:

1. There is now on deposit in The Merchants National Bank of this city to the credit of the undersigned the sum of $30,806.82.

2. Of said sum of $30,806.82, there has been collected on account of the assets set apart or charged off at the time of the reduction of the capital stock of said bank, the sum of $14,490.70, leaving a balance of $16,316.12.

3. If the proposition submitted to this court by the undersigned of a settlement between the undersigned and Franklin S. Jerome in the application of the date herewith is made, there will be received to be applied to said $16,316.12, the sum of $8,333.33, making the sum of $24,649.45.

4. The undersigned is of the opinion that he will be able to receive from the remaining assets of said bank, exclusive of the charged off or set aside assets a sum approximating to $10,000.00, and that the said proposed settlement with said Jerome contemplates a declaration of a dividend by the undersigned of 10 per cent. on the capital stock of said bank. He therefore applies for an order authorizing him to declare a dividend of 10 per cent. on the capital

stock of said bank at a time to be fixed by this court, upon the consummation of said proposed settlement with said Jerome.

LEWIS SPERRY, *Receiver,*
By His Attorney, SOLOMON LUCAS.

Filed Dec. 23, 1903.

JOHN C. AVERILL, *Clerk.*

Granted by the Court, Dec. 24. 1903.

Superior Court, New London County, December 23rd, 1903.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

Order to Declare a Dividend.

It appearing to and being found by this court that a 10 per cent. dividend on the capital stock of the defendant bank can be declared from the cash assets now in the hands of the receiver as by a statement of said Receiver filed in court of this date will fully appear, it is hereby ordered that the receiver is authorized to pay from the general assets of The Second National Bank in his hands on or before the — day of January, 1904, a dividend of 10 per cent. on the par value of the shares of the capital stock of said bank, provided the proposed settlement is made with Franklin S.
17 Jerome, as applied for to this court by said receiver and as by said application on file of this date will fully appear.

By the Court.

JOHN C. AVERILL, *Clerk.*

Filed Dec. 23, 1903.

JOHN C. AVERILL, *Clerk.*

Passed Dec. 24, 1903.

Superior Court, New London County, December 19, 1903.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

The State Savings Bank, a corporation located at Hartford, Connecticut, appears in Court and represents that on May 24th, 1900, and on June 9th, 1900, it owned and for more than one year prior to the last mentioned date, it had continuously owned one hundred shares of the capital stock of the Second National Bank, Defendant in this action, and that its ownership was on said dates, and during all said period recorded in the books of said Bank. That on May 24th, 1900, the stockholders of said Bank voted to reduce its capital

stock from Three Hundred Thousand Dollars ($300,000.) to Two Hundred Thousand Dollars ($200,000.), and that their said action was approved by the Comptroller of the Currency on June 9th, 1900, on condition that the Directors of said Bank take the action hereinafter mentioned. That the Directors of said Bank at a meeting duly called and held for that purpose on the 27th day of June, 1900, set aside certain of the assets of said Bank for the benefit of the stockholders of said Bank of record June 9th, 1900. That the following is the vote of said Directors: "At a special meeting of the Directors held Wednesday, June 27th, 1900, present, C. P. Cogswell, S. A. Gilbert, W. A. Smith, A. J. Dawley, Frank Ulmer and N. D. Sevin. It was voted: That the assets of this Bank contained in the accompanying schedule, and on account of which the capital stock of the
18 Bank has been reduced from Three Hundred Thousand Dollars ($300,000.) to Two Hundred Thousand Dollars ($200,000.), be set aside from the other assets of the Bank and be held by it in trust for the stockholders of record on the 9th day of June, 1900, and that whatever may be realized from said assets be distributed from time to time as may be reasonable among said stockholders in proportion to their respective holdings on said date.

SCHEDULE.

Bond %	Coffin & Stanton	$9,834.00
" "	American Linseed Oil Co.	5,125.00
Real Estate	W. F. Bailey	1,000.00
" "	J. B. Gribben & wife	1,717.52
" "	C. H. Hulbert	1,703.65
Demand loans	C. B. Rogers & Co.	24,380.00
" "	Whitestone Co.	6,906.18
" "	E. A. Packer	15,647.50
Bills Dis.	C. P. Posey	5,000.00
" "	W. H. Silberhorn	2,500.00
" "	J. J. Toomey	300.00
" "	Grace Gryzwacz	100.00
" "	J. A. Chapdelain	226.01
" "	W. A. White	50.00
" "	Maria Rogers	91.00
" "	Union Shoe & L. Co.	7,000.00
" "	T. P. Geer	8,470.07
" "	T. P. Geer	5,256.93
" "	Harper Bros. ½	5,000.00
		$100,307.86

That after said June 27th, 1900, said The State Savings Bank surrendered its certificate of said one hundred shares of said stock of The Second National Bank because of said reduction, and received in lieu thereof a certificate of sixty-seven shares of the
19 capital stock of said Bank, that it continued to own said last mentioned stock until the — day of —— 1902, when it sold

and transferred the same. But it has never sold or disposed of its right to and interest in any part of the assets mentioned in said vote of the Directors of said The Second National Bank, adopted June 27th, 1900. Said reduction of the capital stock of said The Second National Bank to the amount of One Hundred Thousand Dollars ($100,000.) was not in the opinion of the Comptroller of the Currency, or in fact made necessary by impairment of the value of the assets of said Bank, and the assets of said Bank at the time of said reduction exclusive of those mentioned in said vote of the Directors of June 27th, 1900, were sufficient to make the capital stock when reduced as aforesaid, worth its par value and to create a proper surplus.

As the owner of said one hundred shares of said stock, on May 24th, 1900, and June 9th, 1900, it the said The State Savings Bank, claims its proportionate share of the assets set aside by said vote of the Directors of June 27th, 1900, for the benefit of stockholders of said Bank of record June 9th, 1900, and of whatever has been realized from said assets or of any of them.

THE STATE SAVINGS BANK,
By F. T. BROWN, *Its Attorney.*

Filed Dec. 21, 1903.

JOHN C. AVERILL, *Clerk.*

NOTE BY CLERK.—Like claims in form, but differing in amounts, were filed by

The Collinsville Savings Society.
The Falls Village Savings Bank.
The Stafford Savings Bank.
The Windham County Savings Bank.
The Waterbury Savings Bank.
The Southington Savings Bank.

20 Superior Court, New London County.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

The Guilford Savings Bank, a corporation located at Guilford, Connecticut, appears in Court and represents that on May 24th, 1900, and on June 9th, 1900, it owned and for more than one year prior to the last mentioned date it had continuously owned twenty-five shares of the capital stock of The Second National Bank, Defendant in this action, and that its ownership was on said dates, and during all said period recorded in the books of said Bank. That on May 24th, 1900, the stockholders of said Bank, at a meeting duly called and held for that purpose by the vote of stockholders owning more than two-thirds of the capital stock of said Bank, voted to reduce its capital stock from Three Hundred Thousand Dollars ($300,000.) to Two Hundred Thousand Dollars ($200,000.), and that their said action was approved by the Comptroller of the Currency on June 9th, 1900,

on condition that the Directors of said Bank take the action hereinafter mentioned. That the Directors of said Bank at a meeting duly called and held for that purpose on the 27th day of June, 1900, set aside certain of the assets of said Bank for the benefit of the stockholders of said Bank of record June 9th, 1900. That the following is the vote of said Directors: "At a special meeting of the Directors held Wednesday, June 27th, 1900, present, C. P. Cogswell, S. A. Gilbert, W. A. Smith, A. J. Dawley, Frank Ulmer and N. D. Sevin. It was voted: That the assets of this Bank contained in the accompanying schedule, which assets are considered either bad or doubtful, and on account of which the capital stock of the Bank has been reduced from Three Hundred Thousand Dollars ($300,000.) to Two Hundred Thousand Dollars ($200,000.), be set aside from the other assets of the Bank and be held by it in trust for the stockholders of record on the 9th day of June, 1900, and that whatever may be realized from said assets be distributed from time to time as
21 may be reasonable among said stockholders in proportion to their respective holdings on said date.

[NOTE BY CLERK.—Here follows schedule, as hereinbefore printed.]

That after said June 27th, 1900, said The Guilford Savings Bank surrendered its certificate of said twenty-five shares of said stock of The Second National Bank because of said reduction, and received in lieu thereof a certificate for sixteen shares of the capital stock of said Bank, that it continued to own said last mentioned stock until the — day of —— 1902, when it sold and transferred the same. But it has never sold or disposed of its right to and interest in any part of the assets mentioned in said vote of the Directors of said The Second National Bank, adopted June 27th, 1900. Said reduction of the capital stock of said The Second National Bank to the amount of One Hundred Thousand Dollars ($100,000.) was not in the opinion of the Comptroller of the Currency, or in fact made necessary by impairment of the value of the assets of said Bank. And the assets of said Bank at the time of said reduction, exclusive of those mentioned in said vote of the Directors of June 27th, 1900, were sufficient to make the capital stock when reduced as aforesaid, worth its par value and to create a proper surplus.

As the owner of said twenty-five shares of said stock, on May 24th, 1900, and June 9th, 1900, it The Guilford Savings Bank claims its proportionate share of the assets set aside by said vote of the Directors of June 27th, 1900, for the benefit of stockholders of said Bank of record, June 9th, 1900, and of whatever has been realized from said assets or of any of them.

THE GUILFORD SAVINGS BANK,
By F. T. BROWN, *Its Attorney.*

Filed Jan. 12, 1904.

JOHN C. AVERILL, *Clerk.*

22 Superior Court, New London County, June 1, 1904.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

Charles P. Cogswell, of Norwich, Connecticut, appears in Court and represents—that on May 24th, 1900, and on June 9th, 1900, and for more than six months prior to the last mentioned date, the following named parties owned the number of shares set opposite their names of the capital stock, of The Second National Bank, Defendant in this action, and that said ownership was on said dates and during all said period recorded in the books of said Bank.

The Amherst Savings Bank	125	Shares.
The Farmers & Mechanics Savings Bank of Middletown	120	"
The Savings Bank of New Britain	90	"
The Brooklyn Savings Bank	50	"
The Colchester Savings Bank	50	"
The Savings Bank of Stafford Springs	50	"
The Millbury Savings Bank (Millbury, Mass.,)	40	"
The Norfolk Savings Bank	38	"
The Thomaston Savings Bank	25	"
The Middletown Savings Bank	12	"
Estate Edward Joslin	75	"
Ellen E. Avery	46	"
Catherine M. Andrews	30	"
Prudence A. Norman	30	"
Susan L. F. Jewett	28	"
Estate Anne Marie Guilford	25	"
John R. Root	25	"
Estate Wm. R. Gay	24	"
Sarah L. Geer	20	"
Lucy Geer	20	"
Wm. D. Manning	20	"
Colchester Library Association	20	"
23 Estate Henry W. Kingsley	20	"
Alice A. Rudd, Estate	20	"
Harriet A. Stockley	20	"
Mary St. John Rudd	20	"
J. Guilford Burnett, Trustee	20	"
Eliza W. Crary	18	"
Ellen Geer	15	"
Henry A. Atkins	15	"
Estate Hannah Wooley	15	"
Estate Edward Reed	15	"
Charlotte J. Stone	15	"
Ida W. Beale	14	"
J. A. Atwood, Trustee, Estate A. Fenner	13	"
Stephen N. Yerrington	13	"

E. A. Fawcett	12	Shares.
E. J. Whittemore	12	"
Estate Emily B. Hopkins	11	"
J. A. Atwood, Trustee, Estate Mathewson	10	"
Margaret Chapin Bazeley	10	"
Henry C. Longley	10	"
Estate Susan B. Shove	10	"
Harriet A. Joslin	10	"
Estate Mary E. Arnold	10	"
Samuel Mawhinney	10	"
Erastus Jones	10	"
Parkham T. Denny	10	"
Sophia N. Baxter	10	"
Wm. G. Mitchell	10	"
Foresters Home Fund, B. H. Mattoon, Tr.	10	"
Susan B. Palmer	10	"
Edna J. Towle	8	"
Phillip D. Hall	7	"
Asa T. Jones	6	"
Ella B. Johnson	5	"
J. A. Atwood, Trustee, Estate C. Hill	5	"
24 Louisa F. Andrews	5	"
Estate Carrie A. George	5	"
Anna C. Soule	5	"
Estate Eliza A. Nelson	5	"
Joseph H. Whittaker	5	"
Caroline T. Smith	5	"
J. Guilford Burnett	4	"
Estate Frederick B. Hand	4	"
Sarah C. Putnam	4	"
Emma C. Putnam	4	"
Hattie S. Putnam	4	"
Wm. Babcock	4	"
Sarah F. Davis	3	"
Mary Fitch	3	"
Estate Hannah Johnson	3	"
Charles H. Post	3	"
Wm. F. Hall	3	"
N. Douglas Sevin	10	"
	1,472	

That on May 24th, 1900, the stockholders of said The Second National Bank, at a meeting duly called and held for that purpose voted, by the vote of stockholders, owning more than two-thirds of the capital stock of said Bank, to reduce its capital stock from Three Hundred Thousand Dollars to Two Hundred Thousand Dollars, and that their said action was approved by the Comptroller of the Currency on June 9th, 1900, on condition that the Directors of said Bank take the action hereinafter mentioned. That the Directors of said Bank at a meeting duly called and held for that purpose on the

27th day of June, 1900, set aside certain of the assets of said Bank for the benefit of the stockholders of said Bank of record June 9th, 1900. That the following is the said vote of said Directors:

"At a special meeting of the Directors held Wednesday,
25 June 27th, 1900, present C. P. Cogswell, S. A. Gilbert, W. A. Smith, A. J. Dawley, Frank Ulmer and N. D. Sevin. It was voted: That the assets of this Bank contained in the accompanying schedule, which assets are considered either bad or doubtful, and on account of which the capital stock of the Bank has been reduced from Three Hundred Thousand Dollars to Two Hundred Thousand Dollars, be set aside from the other assets of the Bank and be held by it in trust for the stockholders of record on the 9th day of June, 1900, and that whatever may be realized from said assets be distributed from time to time as may be reasonable among said stockholders in proportion to their respective holdings on said date.

[NOTE BY CLERK.—Here follows schedule, as hereinbefore printed.]

That after said June 27th, 1900, each of said above named stockholders surrendered his certificate of his said number of shares of the stock of said The Second National Bank because of said reduction, and received in lieu thereof a certificate of his proportional number of shares of the capital stock of said Bank as reduced as aforesaid. Afterwards each of said above named stockholders sold, assigned and transferred to said Charles P. Cogswell, all his right, title and interest in and to any part and the whole of the assets, mentioned in said vote of the Directors of said The Second National Bank, adopted June 27th, 1900, and belonging to him as the owner of said shares of the capital stock of said Bank on June 9th, 1900. And said Cogswell is the owner of all said rights and interests in and to the assets mentioned in said vote of the Directors of said The Second National Bank, and in whatever may have been or may hereafter be realized from said assets or any of them.

Said reduction of the capital stock of said The Second National Bank to the amount of One Hundred Thousand Dollars, was not in the opinion of the Comptroller of the currency or in fact made necessary by impairment of the value of the assets of said Bank,
26 and the assets of said Bank at the time of said reduction, exclusive of those mentioned in said vote of the Directors of June 27th, 1900, was sufficient to make the capital stock of said Bank when reduced as aforesaid worth its par value and to create a proper surplus.

As the owner of said rights and interests of the above mentioned stockholders, in the assets mentioned in said vote of the Directors, of June 27th, 1900, and accruing to them as stockholders of record on June 9th, 1900, as aforesaid, said Cogswell claims his proportionate share of the assets set aside by said vote of the Directors of said Bank, and of whatever has been realized from said assets or any of them.

CHARLES P. COGSWELL.

Filed June 21, 1904.

JOHN C. AVERILL, *Clerk.*

Superior Court, New London County, November 16th, 1903.

C. P. COGSWELL
vs.
SECOND NATIONAL BANK.

Claim of F. S. Jerome.

Now appears F. S. Jerome, of Norwich, Connecticut, in the above entitled cause as a claimant in respect to the assets charged off at the time of the reduction of the capital stock of said bank, and respectfully represents as follows:

1. At the termination of the corporate existence of the defendant bank, this claimant owned and still owns 1,021 shares of the capital stock of said Second National Bank as it existed after said reduction, and said shares now represent and were issued by said bank in exchange for 1,531½ shares of the capital stock of said bank before said reduction, which were surrendered and given up to said bank at the time of said reduction.

2. Said charged off assets from and after said reduction remained in the possession and control of said bank, and together with the proceeds of any realized upon, formed a part of the
27 capital of said bank represented by its existing and outstanding shares.

This claimant claims that said charged off assets together with the proceeds of any realized upon, in the possession of and belonging to said bank at the termination of its existence and which have come into the hands of said Receiver, belong to the persons including this claimant, who were shareholders owning the shares representing the capital stock of said bank at the termination of its existence, and should be distributed to them pro rata according to the number of shares owned by each and this claimant should receive a proportion represented by 1,021 shares.

F. S. JEROME,
By BROWN & PERKINS,
His Attorneys.

Filed Nov. 17, 1903.

JOHN C. AVERILL, *Clerk.*

NOTE BY CLERK.—Like claims in form, but differing in amounts, were filed by
D. L. Underwood.
Andrew Radel.
Ira L. Peck.
H. H. Gallup.
R. W. Perkins.
The Stonington Savings Bank.
M. Eugene Lincoln.

New London County Superior Court, July 28th, 1904.

C. P. COGSWELL
vs.
SECOND NATIONAL BANK.

Memorandum of Decision.

The question in this case arises under the application of the receiver of the Second National Bank, dated October 30, 1903, for instructions with reference to the conflicting claims of stock-
28 holders of record May 24th, 1900, and stockholders of record at the termination of the corporate existence of said bank with reference to the proceeds of about $100,000 face value of so-called charged off assets which are claimed to have been charged off and set aside at the time of the reduction of the capital stock.

Without going into detail the material facts seem to be in substance the following:

Pursuant to a warning of a stockholders' meeting to consider a reduction of the capital from $300,000 to $200,000, and to give the cashier's idea as to the items which ought to be charged off, a meeting of the stockholders was held April 3rd, 1900, at which it was voted to reduce the capital stock $100,000, and at the same meeting a list of items proposed to be charged off amounting to $101,317.86 was presented by the president. Later another meeting of the stockholders was called to consider making a reduction of the capital stock and determining the method of the same, and on May 24th, 1900, it was voted to reduce the capital stock to $200,000. No action was taken by the stockholders with reference to charging off assets.

At a meeting of the directors held June 27, 1900, an amended and substitute list of charged off assets amounting to $100,307.86 was presented and adopted by the directors and they voted, "That the assets of this bank contained in the accompanying schedule, which assets are considered either bad or doubtful, and on account of which the capital stock of the bank has been reduced from three hundred to two hundred thousand dollars, be set aside from the other assets of the bank and be held by it in trust for the stockholders of record on the 9th day of June, 1900, and that whatever may be realized from said assets be distributed from time to time as may be reasonable among said stockholders in proportion to their respective holdings on said date." Then follows a schedule of the charged off items.

On the list of so-called charged off assets finally adopted at least two items were only in part charged off but were carried for the valuation retained as capital of the bank. Most of the items,
29 however, were charged off entirely. Thereafter the bank opened a separate account with these charged off assets, treating them in substance as a trust fund for the benefit of stockholders existing at the date of the reduction of capital stock, in which the receipts and expenses were carried, and at the present time there has been collected from the so-called charged off assets about

$20,490.70, which is now in the hands of the receiver, and it is estimated by the receiver that some $2,000 more may be realized.

The certificate of the comptroller approving the reduction of the capital stock is unconditional. There were, however, various interviews and letters between the bank or its officers and the comptroller with reference to the proposed reduction and the conditions upon which it would be approved. The letter of May 15th, 1969, by the comptroller may be taken as expressing the condition, which is in the following language: "You are respectfully advised that the proposed reduction of $100,000 will be approved provided so much of the amount as is necessary is used to charge off bad, doubtful and unproductive assets, the difference only being paid to the share holders in cash."

Purporting to act upon this condition a statement was filed with the comptroller dated June 9, 1900, signed by the directors, in which it was said, "$100,000 will be used for the purpose of charging off bad, doubtful and unproductive assets, no money to be paid to the share holders unless realized from said assets which are to be set aside and collected for the benefit of the share holders of record at date of the issuance of the comptroller's certificate approving the reduction."

It will be observed that the statement by the directors goes a good deal further than the condition imposed by the comptroller.

It should perhaps further be stated that the reduction of the capital stock was voluntary and that, after charging off the assets above referred to as bad or doubtful, the assets of the bank were still in excess of its reduced capital stock.

Share holders or their assignees of record at the date of the reduction, and the shareholders at the time of the expiration of
30 the charter have both filed their claims with the receiver, and claim to be entitled to the proceeds of this fund.

So far as any of the items making up the amount of $100,307.86 voted by the directors to be set aside June 27, 1900, represent assets reduced in value in part or scaled down, but not wholly charged off, and which continued to be carried by the bank at said reduced valuation, I think it clear on principle that these items remain part of the capital of the bank, and that the proceeds of these items belong to the bank as a corporation and so are part of the assets to which the stockholders of record on the expiration of the charter are entitled upon liquidating the affairs of the bank. As well expressed by Mr. Cogswell upon the witness stand, in taking these assets at a reduced valuation the bank has "taken the risk" at the new valuation. As to the larger part of the items in the list of items voted to be charged off by the directors June 27, 1900, they are wholly charged off and the situation as to these is therefore somewhat different; but I conclude that the result is the same. Taking the whole evidence and record of the proceedings together I think the reduction and charging off were to cover any impairment of the capital stock and still leave the bank with a fair surplus of some $40,000.

The action of the directors as to the charging off was a declaration that there was no then existing value to the items charged off. If

this is so there was no capital then set aside, no surplus fund created by the reduction, and nothing to distribute among the stockholders. The case of Seeley *v.* New York National Exchange Bank, 8 Daley, 400, cited by counsel for the stockholders of record at the time of the reduction, contemplates a case where actual assets of the bank were, by the reduction of the capital stock set free; and so I do not think this case applies to the facts now before the Court.

The rights of stockholders to a distribution are, it seems to me, to be determined by the condition as it existed at the time of the reduction, and the situation appears from the entire evidence to be rather like that of McCann against First National Bank of
31 Jeffersonville, 112 Ind., 354, and the case of McCann, Trustee, *vs.* The same bank, 131 Ind., page 95. It appears in the latter case that assets were charged off and that the stockholders voted to place the charged off assets in the hands of trustees for the use and benefit of the stockholders; that subsequently those assets became of value, and the bank realized a large sum upon them, and the question there arose whether this sum belonged to the bank or belonged to the stockholders of record at the time of the reduction and charging off, and the court, relying upon the case in the 112th Ind., *supra,* held that the proceeds of these charged off assets belonged to the bank.

There seems to be a great dearth of authority upon the question, but as the latest and only adjudications on the subject which appear to be sufficiently in point I feel bound to follow the Indiana cases, and hold that the stockholders of record at the time of the reduction of the capital stock are not, as such, entitled to share in the proceeds of the so-called charged off assets, but that they belong primarily to the bank, and so, upon liquidation, to the stockholders of record at the time of the expiration of the charter of the bank.

The receiver is advised in accordance with the foregoing, and a separate order to this effect will be filed.

GAGER, *J.*

Filed July 28, 1904.

JOHN C. AVERILL, *Clerk.*

New London County Superior Court, July 28th, 1904.

C. P. COGSWELL
vs.
SECOND NATIONAL BANK.

Order Upon Receiver's Application for Instructions with Reference to Disposition of Proceeds of Charged Off Assets, Dated October 30, 1903.

Due notice having been given of the hearing upon the foregoing application, and the same having been heard with witnesses
32 and counsel, and the claims of the stockholders of record at the time of the reduction of said capital stock and those of record at the time of the expiration of the charter of said bank having been duly considered, I find that the proceeds of the charged off assets

referred to in said application belonged to the bank as a corporation and, upon its liquidation, to the stockholders who may be entitled to a distribution of the funds of said bank upon a winding up according to law; and it is

Ordered, that the proceeds of the assets of said bank of the face value of $100,307.86, as enumerated and specifically described in the vote of the directors of said bank, dated June 27, 1900, the same being the assets of said bank charged off upon the reduction of the capital stock of said bank from three hundred thousand to two hundred thousand dollars, which said proceeds now consist of about $20,490.70 in cash and unsold assets of the estimated value of $2,000, belong to and are the property of said bank, and are to be distributed as part of the capital of said bank to the stockholders of record at the time of the expiration of the charter of said bank or their lawful assignees, as such capital remaining upon the settlement of the affairs of a national bank is by law to be distributed among its stockholders.

GAGER, *J.*

Filed July 28, 1904.

JOHN C. AVERILL, *Clerk.*

New London County Superior Court, August 1st, 1904.

CHARLES P. COGSWELL, of Norwich, New London County, Connecticut,

vs.

THE SECOND NATIONAL BANK, a Corporation, Located at said Norwich.

Notice of Appeal.

Charles P. Cogswell, a party to the above entitled action hereby gives notice that he appeals from the judgment rendered
33 therein by the Superior Court (Gager, Judge), to the Supreme Court of Errors next to be held after the filing of the appeal, in the Second Judicial District.

CHARLES P. COGSWELL,
By F. T. BROWN, *His Attorney.*

Filed Aug. 2, 1904.

JOHN C. AVERILL, *Clerk.*

New London County Superior Court, August 1st, 1904.

CHARLES P. COGSWELL, of Norwich, New London County, Connecticut,

vs.

THE SECOND NATIONAL BANK, a Corporation, Located at said Norwich.

Notice of Appeal.

The State Savings Bank, a party to the above entitled action, hereby gives notice that it appeals from the judgment rendered

therein by the Superior Court (Gager, Judge), to the Supreme Court of Errors next to be held after the filing of the appeal, in the Second Judicial District.

THE STATE SAVINGS BANK,
By F. T. BROWN, *Its Attorney.*

Filed Aug. 2, 1904.

JOHN C. AVERILL, *Clerk.*

NOTE BY CLERK.—Similar notices of appeal, filed August 2, 1904, were received from
The Collinsville Savings Society.
The Falls Village Savings Bank.
The Stafford Savings Bank.
The Guilford Savings Bank.
The Windham County Savings Bank.
The Waterbury Savings Bank.
The Southington Savings Bank.

34 New London County Superior Court, Nov. 30th, 1904

C. P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

Finding.

In the above entitled action a receiver having been appointed and such proceedings had as appears by the record, the Court having, upon the 30th of October, 1903, made an order citing the parties named in said order to appear and be heard in reference to the ownership and distribution of the assets referred to in said order, and such order having been duly served, and the State Savings Bank, the Collinsville Savings Society, the Falls Village Savings Bank, the Stafford Savings Bank, the Guilford Savings Bank, the Windham County Savings Bank, the Waterbury Savings Bank, the Southington Savings Bank, Charles P. Cogswell, D. L. Underwood, Andrew Radel, Ira L. Peck, H. H. Gallup, R. W. Perkins, the Stonington Savings Bank, M. Eugene Lincoln and F. S. Jerome having appeared in court and filed their respective claims as appears of record, said cause came to the May Session, 1903, of this Court, when all parties to said action, including the receiver, appeared and were heard, and the following facts appeared in evidence and are found and made part of the record.

1. The defendant, The Second National Bank of Norwich, at the time of the reduction of its capital stock as hereinafter stated, was and for many years prior thereto had been, a banking association organized and existing under the laws of the United States, with a capital stock of $300,000, and located in the town of Norwich.

2. In December, 1899, the officers of said bank were considering the matter of a reduction of its capital stock, and in response to an enquiry for information as to the course to be pursued the Deputy

and Acting Comptroller of the Currency sent to the Cashier of said bank a letter of instructions, dated December 4, 1899, a copy of which is hereto annexed marked Exhibit "A."

35 3. At a meeting held February 19, 1900, the Directors of said Bank took such preliminary action looking towards a reduction of its capital stock as appears by the vote contained in Exhibit "B," hereto annexed.

4. On March 9, 1900, the Deputy and Acting Comptroller of the Currency wrote to the bank a letter which was received by the bank, and a copy of which is hereto annexed, marked "C."

5. On April 3, 1900, a meeting of the stockholders of the bank was duly called and held, at which meeting action was taken, as appears by a copy of the record of the meeting hereto annexed, marked "D." Said vote was ineffective as a reduction because the vote in favor of a reduction was less than two-thirds of the entire capital stock.

6. On May 9, 1900, a meeting of the Directors of the bank was duly called and held, at which action with reference to the reduction of the capital stock of the bank was taken, as appears by a copy of the record of the doings of the meeting hereto annexed, marked "E."

7. On May 15, 1900, the Deputy and Acting Comptroller of the Currency wrote to the bank a letter which the bank received, and a copy of which is hereto annexed, marked "F."

8. On May 19, 1900, the Comptroller of the Currency wrote to the bank a letter which the bank received, and a copy of which is hereto annexed, marked "G."

9. Prior to the reduction of the capital stock, the president of the bank, in an interview with the Comptroller of the Currency, stated what was proposed to be done with the assets, and thereupon the Comptroller said, "That is understood and agreed, but you must remember that the assets belong to the stockholders of record, and a trust fund must be created so that those assets may be distributed among the stockholders of record when your capital is reduced."

36 10. On May 24, 1900, at a meeting of the stockholders of the bank duly called and held for that purpose, action with reference to the reduction of the capital stock of the bank was taken, as appears by the record of the doings of the meeting, a copy of which is hereto annexed, marked "H." No action was taken at said meeting by the stockholders in relation to the disposition of the charged off assets hereinafter described in paragraph 14.

11. On June 9th, 1900, the Directors of the bank wrote to the Comptroller of the Currency a letter which was received by the Comptroller, and a copy of which is hereto annexed, marked "I."

12. And on June 9, 1900, The Deputy and Acting Comptroller of the Currency wrote to the bank a letter which was received by the bank, and a copy of which is hereto annexed, marked "J," and enclosed in it his certificate of his approval of the reduction of the capital stock of the bank, a copy of which certificate is hereto annexed, marked "K."

13. On June 12, 1900, the Deputy and Acting Comptroller of the

Currency wrote to the bank a letter which the bank received a copy of which is hereto annexed, marked "L."

14. On June 27, 1900, at a meeting of the Directors of the bank, duly called and held, such action was taken with reference to the bad or doubtful assets on account of which the capital stock had been reduced as appears in Exhibit "M," hereto annexed.

15. On June 27, 1900, after said reduction, of capital stock had become effective by the certificate of approval of the Comptroller, the bank credited its capital stock with the reduction of $100,000 and charged to profit and loss the list of bad and doubtful assets amounting to $100,307.86 specified in the schedule contained in Exhibit "M."

16. At the time of said reduction of capital stock, said assets of the face value of $100,307.86, described in said schedule, were except for the real estate included therein, assets upon which the interest was past due and unpaid for six months and which
37 were not well secured, though certain of said assets were in process of collection, and they were the same assets referred to in the letter of the directors to the Comptroller of the Currency, Exhibit "I."

17. Said reduction of capital stock was made to meet the diminution in the assets and consequent impairment of the capital of the bank caused by charging off said assets described in said schedule in the manner hereinbefore set forth, and not for the purpose of setting free any capital of the bank.

18. At the time of said reduction of the bank's capital stock, the net capital of the bank applicable to stock at the valuation at which its assets were then carried on, its books was, exclusive of the assets mentioned in the schedule incorporated in the vote of the Directors passed June 27, 1900 (which assets also belonged to said bank at the time of said reduction), of the then actual value of between $240,000 and $250,000, but no question exists in this case as to the disposition of said apparent surplus of $40,000 to $50,000; and on the assets making up this apparent surplus losses of from twelve to fifteen thousand dollars were suffered and charged off later.

19. The bank continued in active business until the expiration of its charter, February 24, 1903, and the specific assets charged off as aforesaid were retained and kept possession of by said bank until delivered to the receiver and were cared for by its officers and clerks except such as were disposed of for cash, and all expense incurred in relation to those assets was paid for out of the till of the bank, and all cash received from such assets was put into the till of the bank and mingled with its other funds, but a separate account thereof was kept as hereinafter stated.

20. After June 27, 1900, the bank proceeded, from time to time, to realize upon the assets mentioned in the record of the Directors' meeting of June 27, 1900, and the net amounts received were carried as an item distinct from the ordinary accounts of the bank, and were entered as a credit under the heading of "Stock-
38 trust" in the books of "daily balance credit" and an account was opened in the General Ledger of the bank with "stock-

holders' trust," and entries were made therein crediting receipts from said assets as disposed of to stockholders' trust and charging to stockholders' trust the expenses incurred in realizing on said assets, and a copy of said account in the General Ledger is hereto-annexed and marked "N." This method of treating said assets was continued until the expiration of the charter of said bank, February 24, 1903.

21. In the case of each asset included in the schedule of Exhibit "M," the whole asset owned by the bank was included and carried out at its face value with two exceptions, viz: The item in bond account "American Linseed Oil Co." had a face value of $6,125., of which $5,125. was charged off, and the first item "T. P. Geer note" had a face value of $10,470.04 of which $8,470.04 was charged off. The said amounts were charged off as estimated loss and said items at the reduced valuation of $1,000., and $2,000., respectively were carried at such reduced rates as live assets of the bank, to make up its capital after reduction.

22. In relation to the item designated in said schedule "M" as "real estate," the bank owned and had title to the same in its own name.

23. From items in said schedule "M" which were wholly charged off there has been realized the net amount of $20,240 which is now in the receiver's hands. The receiver also has certain of said wholly charged off assets now in hand which he estimates to be of the value of about $2,000.

(See correction.)

24. Nothing has been realized on the items American Linseed Oil Co. and J. P. Geer note, charged off in part, and particularly described in paragraph 21 of this finding.

25. On June 9, 1900, and for more than a year prior thereto, said The State Savings Bank, The Southington Savings Bank, The Collinsville Savings Society, The Falls Village Savings Bank, TheWaterbury Savings Bank, The Guilford Savings Bank,
39 The Stafford Savings Bank, The Windham County Savings Bank and Charles P. Cogswell owned shares of the capital stock of said Second National Bank and were stockholders of record on its books as follows:

The State Savings Bank	100	shares.
The Southington Savings Bank	40	"
The Collinsville Saving Society	97	"
The Falls Village Savings Bank	89	"
The Waterbury Savings Bank	100	"
The Guilford Savings Bank	25	"
The Stafford Savings Bank	75	"
The Windham County Savings Bank	100	"
Charles P. Cogswell	12	"
	638	

26. After July 1, 1900, all of the stockholders, none of whom had disposed of any of their said holdings in the meantime, sur-

rendered to said The Second National Bank the certificates for their said respective numbers of shares without any reservation, and received from the bank certificates for two-thirds of said number. Afterwards all of said savings banks except the State Savings Bank, sold and transferred the number of shares represented by said new certificates without any reservation in such transfers, but have never sold or disposed of any right that they had in the assets mentioned in the schedule incorporated in the vote of the Directors of June 27, 1900, unless the transfer of said shares, without expressly reserving said rights as a matter of law, carried with it such right. There are also some four hundred shares of other holders which have never been transferred.

27. Said State Savings Bank and Charles P. Cogswell are still owners of record of the number of shares represented by their said new certificates respectively, and said Cogswell owns in addition 511 shares of said stock transferred to him since said reduction and said Cogswell is also the assignee for value of all the rights in the assets mentioned in schedule "M" of parties who owned on June 9, 1900, and had continuously owned for more than six months prior thereto, in the aggregate 1,472 shares of the capital stock of said bank, and had their ownership recorded on the books of said bank during all of said period.

28. There was no change in the ownership of the capital stock of said bank or in the record of ownership from May 24, 1900, to June 9, 1900, both days included.

29. Said D. L. Underwood, Andrew Radel, Ira L. Peck. H. H. Gallup, R. W. Perkins, The Stonington Savings Bank, M. Eugene Lincoln, and F. S. Jerome were owners of the capital stock of said bank, at the time of the expiration of its charter, to wit, February 24, 1900, as follows:

D. L. Underwood	2 shares.
Andrew Radel	10 shares.
Ira L. Peck	6 shares.
H. H. Gallup	10 shares.
R. W. Perkins	10 shares.
The Stonington Savings Bank	33 shares.
M. Eugene Lincoln	10 shares.
F. S. Jerome	1,021 shares.
	1,102

and are still the owners of said shares.

30. All the parties agreed that said reduction of the capital stock of said bank from $300,000 to $200,000 was valid.

Claims of the Claimants.

31 Upon the foregoing facts said The State Savings Bank, The Collinsville Savings Society, The Falls Village Savings Bank, The Stafford Savings Bank, The Guilford Savings Bank, the Windham County Savings Bank, the Waterbury Savings Bank, the Southing-

ton Savings Bank and Charles P. Cogswell, each claimed
41 and asked the Court to rule, that the Comptroller of the Currency had a right to impose upon said The Second National Bank a requirement that upon said reduction of its capital stock such assets of the bank as were not required to make the capital stock of said bank as so reduced worth its par value should be distributed to or set aside for the benefit of the holders of the stock of said bank of record at the date of said reduction of its capital stock or disposed of in such way that said stockholders should have the benefit of said assets and their net proceeds and that said Comptroller had a right to make such requirement a condition of his approval of said reduction of the capital stock of said bank and also that it was not necessary that the Comptroller of the Currency should incorporate said requirement or condition in his said certificate of approval of the reduction of the capital stock of said bank. That the Comptroller of the Currency did impose such requirement and did make such condition of his approval of said reduction of the capital stock of said bank and particularly that the appropriation of the assets of said bank mentioned in the schedule incorporated in the vote of the Directors of said bank passed June 27th, 1900, for the benefit of the holders of the stock of said bank at the date of said reduction of its capital stock, to wit: June 9, 1900, and the action taken by the Directors of said bank as appears by their said vote of June 27th 1900, were required by, and in compliance with said requirement of the Comptroller of the Currency, that independently of any requirement of the Comptroller of the Currency the law is such that it was the right of said bank and its Directors, and also their duty to distribute among the holders of the stock of said bank at the date of said reduction of its capital stock such part of the assets of said bank as were not necessary to make its capital stock as so reduced, worth its par value, and that independently of any action of the Comptroller of the Currency requiring it to be done, said bank and its Directors had a right and it was their duty to distribute among the holders of the stock of said bank at the time of said reduction of the capital stock, or to set aside and
42 appropriate to their benefit such part of the assets of said bank as were not necessary to make the capital stock of the bank as so reduced worth its par value, and particularly had a right to take action as appears by the vote of said board of directors of June 27, 1900, and that the holders of stock of said bank of record on the date of said reduction of its capital stock independently of any action of the Comptroller of the Currency requiring the distribution among them or appropriation to their benefit of any of the assets of said bank had the right to require that the bank should distribute among them or appropriate to their benefit in proportion to their respective holdings such of the assets of said bank as were not required to make said reduced capital stock of the bank worth its par value and particularly said stockholders had independently of any action of the Comptroller of the Currency the right to require said bank to distribute or in some other lawful way to appropriate to their benefit in proportion to their respective

holdings each of the assets mentioned in the schedule incorporated in said vote of the Directors of the bank passed June 27, 1900, and that independently of any action of the Comptroller of the Currency and said action of said bank and its directors as appears by said vote of June 27, 1900, the holders of the stock of said bank at the date of said reduction of its capital stock, have and each of them has, the right in this action to an order of the Superior Court appropriating to their benefit the net of each of the assets mentioned in said schedule incorporated in said vote of the directors of June 27, 1900, and of the proceeds of any of said assets that have been or may be disposed of so far as said assets or their proceeds are in the possession of the receiver appointed in this action, and that said Court should order the said net of said assets or their proceeds to be distributed or paid over at the proper time by said Receiver to the holders of the capital stock of said bank of record at the date of said reduction of its capital stock in proportion to their respective holdings on said date, and said Cogswell further claimed that in case of the assignment of the rights of such stockholders to him, such payment or distribution should be made
43 to him as assignee. That the amount of the reduction of the capital stock of the Second National Bank was in excess of the amount of the reduction required to meet any impairment thereof, and that such excess of reduction caused an equivalent portion of the capital of said bank to be set free, and that the holders of stock of said bank at the date of said reduction had the right to have such capital distributed among them or in some lawful way returned to them or appropriated to their benefit in proportion to their respective holdings, and that the Comptroller of the Currency had the right to require, and if he saw fit to make it a condition of his approval of said reduction of said capital stock that said bank should distribute, among or return to, or in some lawful way appropriate to the benefit of the holders of the stock of said bank at the date of said reduction such capital in proportion to their respective holdings, and that the Comptroller of the Currency did require such action on the part of the bank, and did make it a condition of his approval of said reduction, and that said action of the Directors of said bank in their vote of June 27, 1900, was in compliance with said requirement of the Comptroller of the Currency and that it was the right and also the duty of the bank to make such disposition of such capital without any such requirement on the part of the Comptroller of the Currency, and that said stockholders had the right to require it to be done, and that the action taken by the Directors of said bank in said vote passed June 27, 1900, was lawful for each of these reasons and lawful in respect to each of the assets mentioned in the schedule incorporated in said vote. And that said vote of the Directors passed June 27, 1900, is valid and binding according to its terms, and that the effect of said vote is to give to the holders of the stock of said bank of record June 9, 1900, the beneficial right and interest in each of the assets mentioned in the schedule incorporated in said vote with the right to have each of said assets and their proceeds distributed among them according to the terms of said vote. And each of said parties

claimed that said ruling should be made in respect to each asset included in the schedule above referred to.

44 *Rulings.*

32. The Court ruled upon the foregoing facts:

(1.) That said letter of May 15, 1900, Exhibit "F," embodied the condition on which the reduction of capital stock would be approved:

(2.) That the statement signed by the Directors, dated June 9, 1900, Exhibit "I," substantially exceeded the terms of the condition:

(3.) That the reduction and charging off were to cover any impairment of the capital stock and still leave the bank with a fair surplus:

(4.) That the action of the Directors as to charging off was a declaration that there was then no existing value to the items charged off:

(5.) That the reduction of the capital stock did not set free any capital or create a surplus fund to be distributed among the stockholders of record at the time of the reduction:

(6.) That the rights of stockholders to distribution were to be determined by the condition as it existed at the time of the reduction.

(7.) And that the stockholders of record at the time of the reduction of the capital stock were not, as such, entitled to share in the proceeds of the so-called charged off assets, but that they belonged primarily to the bank, and so, upon liquidation, to the stockholders of record at the time of the expiration of the charter of the bank.

For a more particular statement of the rulings of the Court reference may be had to the memorandum of decision and the order upon this claim, both dated July 28, 1904, which may be printed as part of the record and finding in this case.

GAGER, *J.*

Filed Nov. 30, 1904.
Refiled Dec. 19, 1904.
Refiled Dec. 26, 1904.

JOHN C. AVERILL, *Clerk.*

45 EXHIBIT "A."

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *December* 4, 1899.

Mr. Ira L. Peck, Cashier, The Second National Bank, Norwich, Connecticut.

SIR: Your letter of November 28, in reference to reducing the capital stock of the bank, was duly received.

It has been ascertained from Mr. Charles P. Cogswell, president of the bank, during his visit to this office, that the amount

of the contemplated reduction is $100,000, and, in accordance with my telegram to you of this date, you will find herewith enclosed the required blanks and instructions to enable you to make the change.

The shareholders must be notified thirty days in advance of the meeting either by mail or publication in local newspapers, the notice specifying the business to be transacted.

Please bear in mind that the directors, other officers and employees of the bank are prohibited from acting as proxy.

The reduction can only be approved, provided so much of the amount as may be necessary is used to charge off the following items before any money is paid to the shareholders:

C. B. Rogers & Company	$24,380
National Linseed Oil Company stock	5,500
Coffin & Stanton balance	9,870

Upon returning the blanks, properly executed and accompanied by a copy of notice calling the meeting of shareholders, showing date of issue, you should send a statement of the directors, under seal of the bank, to the effect that the conditions herein imposed (stating them) will be complied with.

Respectfully,

F. P. KANE,
Deputy and Acting Comptroller.

46 EXHIBIT "B."

At the regular meeting of the Directors held Monday, February 19, 1900, at 11 o'clock a. m., present, C. P. Cogswell, S. A. Gilbert, W. A. Smith, A. J. Dawley, Frank Ulmer, and N. D. Sevin.

Upon motion of W. A. Smith, the cashier was instructed to prepare and submit to the next meeting of the Board a notice and circular to be sent to Stockholders recommending the reduction of the Capital from $300,000 to $200,000, and also to give his idea of the items which ought to be charged off.

Attest,

IRA L. PECK, *Sec'y.*

EXHIBIT "C."

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *March* 9, 1900.

Mr. Ira L. Peck, Cashier, The Second National Bank, Norwich, Connecticut.

SIR: Your letter of March 8 is received, enclosing copy of notice given shareholders on the 1st instant of the meeting to be held on April 3 for the purpose of voting upon the question of amending the articles of association, reducing the capital stock of the bank from $300,000 to $200,000.

You inquire whether the notice meets with approval, and, in

reply, you are respectfully informed that it sufficiently covers the ground. The form of proxy attached thereto requires, however, a twenty-five cent instead of a ten cent Internal Revenue stamp, and, referring to the clause therein with regard to waiving the right to withdraw any portion of the release capital, you are reminded that it will be necessary to obtain the consent of each and every shareholder to the retention of any money which is not necessary for retiring bad and doubtful assets of the bank.

Respectfully,

F. P. KANE,
Deputy Comptroller.

47 EXHIBIT "D."

At the Special Meeting of Stockholders held pursuant to notice Tuesday, April 3d, 1900, at 10 o'clock a. m.

Gardiner Greene was chosen chairman and Ira L. Peck was chosen Secretary.

A roll of the Stock was called and 2,509 shares answered.

The following resolution was presented—

Resolved:—That under the provisions of Section 5143 U. S. Revised Statutes and of the law amendatory thereof, the capital stock of this association be, and the same hereby is, reduced in the sum of $100,000, leaving the total capital after such deduction, $200,000.

The president, Mr. Cogswell, presented a list of items to be charged off amounting to $101,317.86, and explained the same A vote on the resolution resulted in

1677 shares for the same.
549 shares against the same.
283 shares not voting.

2509 shares.

The Secretary was asked to read the Weekly Statement of the Bank for March 31, 1900, and after informal discussion by several parties, it was moved to reconsider the vote and amend the resolution by substituting $75,000 in place of $100,00. A vote being taken, the chairman declared the motion to reconsider not carried by a vote of 956 against 888 shares. Carried by a vote of 1695 against 97 and to reduce $75,000.

Voted to adjourn.

Attest

IRA L. PECK, *Sec'y.*

48 EXHIBIT "E."

At a meeting of Directors held Wednesday, May 9th, 1900, present, C. P. Cogswell, S. Alpheus Gilbert, Arthur J. Dawley, Frank Ulmer, and N. Douglas Sevin, it was Voted:

That a meeting of the Shareholders of this association be held at its Banking House in Norwich on the 24th day of May, A. D.

1900 at ten o'clock A. M. to act upon the question of reducing the Capital Stock of this association to a sum not less than Two Hundred Thousand Dollars, and to determine the method of making such reduction and to make any changes in the Articles of Association that may be proper to conform to the action that may be taken on the above question, and to act on any other matters pertaining to said question that may come before said meeting, and the Cashier of this association is ordered to issue the proper notices for said meeting.

Attest,

IRA L. PECK, *Sec'y.*

EXHIBIT "F."

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *May* 15, 1900.

Mr. Ira L. Peck, Cashier, Second National Bank, Norwich, Conn.

SIR: Your letter of May 9 was duly received, in reference to reducing the capital stock of the bank from $300,000 to $200,000.

You are respectfully advised that the proposed reduction of $100,000 will be approved, provided so much of the amount as is necessary is used to charge off bad, doubtful and unproductive assets, the difference only being paid to the shareholders in cash.

The necessary blanks to effect the reduction are herewith enclosed, and as you will observe thirty days' notice must be given shareholders of a meeting for the purpose of voting on the
49 proposition, at which meeting no director, other officer or employe can act as proxy.

Upon returning the blanks properly executed please accompany them by a copy of notice of meeting, showing date of issue, and statement of the directors, under seal of the bank, to the effect that the conditions herein imposed will be complied with.

Respectfully,

F. P. KANE,
Deputy and Acting Comptroller.

EXHIBIT "G."

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *May* 19, 1900.

Mr. Charles P. Cogswell, President, The Second National Bank, Norwich, Connecticut.

SIR: Your letter of May 18 is received, enclosing copy of the notice given shareholders of the meeting to be held on the 24th instant, and also a copy of the circular letter, to which is attached a form of proxy, relative to reducing the capital stock of the bank from $300,000 to $200,000.

As advised in office letter of May 15 transmitting blanks, the reduction was approved upon the condition that so much only of

the capital set free as is necessary to charge off bad, doubtful and unproductive assets be used for that purpose. If the whole amount of the reduction in capital is not required for the purpose indicated, the consent of each shareholder must be obtained to the withholding from him of any money to which he may be entitled by reason of the reduction. In other words, the shareholders of a national bank, upon a reduction in capital stock, are entitled to either receive the cash or the charged off assets and neither can be withheld without their consent. Under the circumstances, exception is taken to the sentence in the letter to the shareholders in which it is recited that "the course recommended has the cordial approval of the Comptroller of the Currency," for this office does not appear to have concurred in the recommendation of the directors that the assets of the bank remain the same, the number of shares representing them merely to be reduced as proposed.

Respectfully, CHARLES G. DAWES, *Comptroller.*

EXHIBIT "H."

At the Special Meeting of Stockholders held pursuant to notice Thursday, May 24, 1900, at 10 o'clock A. M.

Gardiner Greene was chosen chairman, and Ira L. Peck was chosen Secretary.

A roll of the Stock was called and 2785 shares answered.

The following resolution was presented by M. E. Lincoln.

Resolved:—That, under the provisions of Section 5143 U. S. Revised Statutes and the law amendatory thereof, the capital stock of this Association be, and the same is hereby, reduced in the sum of $50,000, leaving the total Capital after such reduction $250,000.

Mr. Lucas moved an amendment making the reduction $100,000 instead of $50,000, leaving the Capital $200,000 instead of $250,000, a vote on the amendment being taken, resulted in its adoption. 1970 shares for the amendment and 815 against the same. After this a representation of 24 shares came in.

The resolution as amended, making the Capital Stock $200,000 instead of $300,000, was passed. A vote upon same resulted in

2058 shares for the resolution.
172 shares against the resolution and
579 shares not voting.

2809 shares in all.

The meeting then adjourned to Thursday, June 21, 1900, at 12 o'clock M.

Attest,

IRA L. PECK, *Sec'y.*

51 EXHIBIT "I."

SECOND NATIONAL BANK,
NORWICH, CONN., *June* 9, 1900.

Hon. Charles G. Dawes, Comptroller of the Currency, Washington, D. C.

SIR: Referring to your letter of May 15, approving conditionally the proposed reduction of the capital stock of the Second National Bank of Norwich, Connecticut, from $300,000 to $200,000, you are informed that the whole amount of reduction, viz., $100,000 will be used for the purpose of charging off bad, doubtful and unproductive assets, no money to be paid to the shareholders unless realized from said assets, which are to be set aside and collected for the benefit of the shareholders of record at date of the issuance of the Comptroller's certificate approving the reduction.

It is understood that this satisfies all legal requirements, and you are, therefore, requested to issue your certificate of approval, the papers in reference to the meeting of shareholders held on May 24 now being on file in your office.

Respectfully,

CHAS. P. COGSWELL,
S. ALPHEUS GILBERT,
W. A. SMITH,
ARTHUR J. DAWLEY,
FRANK ULMER,
N. DOUGLAS SEVIN,
Directors.

52 EXHIBIT "J."

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *June* 9, 1900.

Mr. Charles P. Cogswell, President, Second National Bank, Norwich, Conn.

SIR: Referring to the meeting of shareholders held on May 24th, at which a resolution was adopted reducing the amount of capital stock in the sum of $100,000, you will find enclosed my certificate approving the reduction leaving the present capital $200,000, which certificate is issued in view of the fact that a statement has to-day been filed by you to the effect that the whole amount of the reduction will be used to charge off bad, doubtful and unproductive assets no money to be paid to the shareholders, unless realized from said assets

In accordance with our understanding, please send a statement signed by the directors relative to disposition of amount of the reduction, to be placed with the one left by you.

Respectfully,

F. P. KANE,
Deputy and Acting Comptroller.

EXHIBIT "K."

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *June* 9, 1900.

Whereas, satisfactory notice has been transmitted to the Comptroller of the Currency that the Capital Stock of "The Second National Bank of Norwich, Connecticut," has been reduced in the sum of One Hundred Thousand Dollars ($100,000), in accordance with the provisions of Section 5143, Revised Statutes of the United
53 States, and that the paid-up Capital Stock of said Bank since said reduction is Two Hundred Thousand Dollars ($200,000):

Now, it is hereby certified, That the Capital Stock of "The Second National Bank of Norwich, Connecticut," aforesaid has been reduced as aforesaid in the sum of One Hundred Thousand Dollars ($100,000), and that the said reduction of Capital is approved by the Comptroller of the Currency.

In witness whereof, I hereunto affix my official signature and seal of office.

[L. S.]

F. P. KANE,
Deputy and Acting Comptroller.

EXHIBIT "L."

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *June* 12, 1900.

Mr. Charles P. Cogswell, President The Second National Bank, Norwich, Connecticut.

SIR: Referring to the recent reduction of the capital stock of the bank from $300,000 to $200,000, the certificate approving which was issued on June 9, you are respectfully informed that I have just received the statement of directors setting forth the disposition to be made of the reduced amount of capital, viz., $100,000, which is worded the same as that signed by you when recently at this office.

Respectfully,

F. P. KANE,
Deputy and Acting Comptroller.

EXHIBIT "M."

At a special meeting of directors held Wednesday, June 27th, 1900, present, C. P. Cogswell, S. A. Gilbert, W. A. Smith, A. J. Dawley, Frank Ulmer and N. D. Sevin, it was voted: That
54 the assets of this Bank contained in the accompanying schedule, which assets are considered either bad or doubtful, and on account of which the Capital Stock of the Bank has been

reduced from $300,000 to $200,000, be set aside from the other assets of the Bank and be held by it in trust for the Stockholders of record on the 9th day of June, 1900, and that whatever may be realized from said assets be distributed from time to time as may be reasonable among said stockholders in proportion to their respective holdings on said date.

SCHEDULE.

Bond %	Coffin & Stanton	$9,834.00
" "	American Linseed Oil Co.	5,125.00
Real Estate	W. F. Bailey	1,000.00
" "	J. B. Gribben & wife	1,417.52
" "	C. H. Hulburt	1,703.65
Demand loans	C. B. Rogers & Co.	24,380.00
" "	Whitestone Co.	6,906 18
" "	E. A. Packer	15,647.50
Bills Dis.	C. P. Posey	5,000.00
" "	W. H. Silberhorn	2,500.00
" "	J. J. Toomey	300.00
" "	Grace Gryzwacz	100.00
" "	J. A. Chapdelain	226.01
" "	W. A. White	50.00
" "	Maria Rogers	91.00
" "	Union Shoe & L. Co.	7,000.00
" "	T. P. Geer	8,470.04
" "	T. P. Geer	5,256.93
" "	Harper Bros. ½	5,000.00
		$100,307.86

Attest:

IRA L. PECK, *Sec'y.*

55 EXHIBIT "N."

Stockholders' Trust.

CREDIT.

1900.			
July	1.	3 Crawfordville W. & L. Cps. a $2.50	7.50
Oct.	30.	Balance Peckham Note	54.44
Nov.	1.	Hulbert Land	1000.00
1901.			
Jan.	3.	3 Crawfordsville W. & L. Cps. a $2.50	7.50
Apr.	2.	Est. J. J. Toomey 18.25%	54.75
"	13.	W. F. Bailey Land, part	200.00
May	21.	John S. Sullivan Blue Hill Lot	100.00
July	1.	3 Crawfordsville W & L. Cps. a $2.50	7.50
Nov.	29.	John S. Sullivan Blue Hill Lot (bal.)	103.00

1902.			
Feb'y	24.	3 Crawfordsville W. & L. Cps. a 2.50	7.50
July	16.	"	7.50
Dec.	4.	Divd. Am. W. W. Nash Co. 2%	250.70
1903.			
Jan.	22.	Sale of Sioux City Lots	1476.00
Feb'y	24.	Whitestone Co. Notes to F. S. J. 21	25.00
Mar.	14.	3 Crawfordsville W. & L.	7.50
Mar.	30.	Wis. West'rn E. A. P. 327	11985.26
May	1.	Maria Rogers Land 330	45.00

DEBIT.

1900.			
Sep.	5.	James B. Mitchell Posey	234.20
"	5.	Husaker & Britt "	325.66
Dec.	11.	A. L. Sanborn "	25.00
"	11.	H. G. Stone Silberhorn	25.00
1901.			
Apr.	4.	Bozrah Tax 1900	7.00
"	11.	Hulbert " "	3.00
Dec.	6.	Sioux City Taxes Geer	51.75
56			
1902.			
Jan.	7.	St. Paul Taxes Gribben	82.65
1901.			
Dec.	11	" " "	18.22
1902.			
Jan.	16.	Int. St. Paul Taxes	20.85
Apr.	9.	C. W. Perkins' Ex. Apr. 25, 1900	35.00
May	21.	S. Lucas (C. B. Rogers matter)	164.72
Dec.	16.	Taxes Sioux City	21.90
"	22.	Recording Deed City	1.00
1903.			
Jan.	16.	L. & Arnold Att's	37.50

Superior Court, New London County, December 6th, 1904.

C. P. COGSWELL
vs.
SECOND NATIONAL BANK.

Request of F. S. Jerome et al., Claimants, for Change in Finding.

The claimants respectfully request the Court to correct, change and add to the finding on file, as follows:

Allowed.

1. Insert at the end of paragraph 10, the following:
"No action was taken by the stockholders in relation to the disposition of the charged-off assets hereinafter described in paragraph 14."

Denied. The Certificate and Letters Show the Facts.

2. Insert after paragraph 14, a new paragraph as follows:
"14½. Said certificate of approval by the Comptroller was unconditional but prior to issuing the same, the Comptroller had fixed the following as a condition upon which the proposed reduction of capital would be approved.
"The proposed reduction of $100,000, will be approved provided so much of the amount as is necessary is used to charge off bad, doubtful and unproductive assets, the difference only being paid to the shareholders in cash."

57 Allowed.

Strike out of Sec. 1 of paragraph 32, the words "might be taken as embodying," and substitute the word "embody."
(The reason for asking the whole of the above change is that counsel claim it should appear as a fact in the finding of facts what the condition was, as it was a conclusion from all the evidence and other facts, and it might be claimed in the form in which the statement now is in paragraph 32, that no finding or conclusion of fact on that point has been reached.)

Allowed in Substance.

3. Strike out paragraph 17 and substitute the following:
"Said reduction of capital was made on account of the impairment of the bank's capital described in paragraph 16, and not for the purpose of setting free any capital to be restored to the stockholders."
(We claim this that it may appear by a finding of fact.)

Allowed.

4. In paragraph 18, after the word "stock" in second line, add the words "at the valuation at which its assets were then carried on its books;" also add at the end of the paragraph the words, "and on the assets making up this apparent surplus losses of from twelve to fifteen thousand dollars were suffered, and charged off later."
(This was shown by cross-examination of Mr. Cogswell and admitted as to the Owaneco Silk Company's assets.)
5. Insert a new paragraph as follows:
"21½. In relation to the item 'Demand Loan E. A. Packer,' the bank, after said reduction, still carried as a part of its live assets a note of C. P. Cogswell, Trustee, for $1,187.50, which was discounted

by it to pay an assessment on sundry shares of Wisconsin Western Railroad stock, which the bank had held as collateral on the E. A. Packer loans (and had converted to itself on said loans), and subsequently on March 30th, 1903, the bank realized on the sale of this stock $11,985.26, which is part of the money referred to in paragraph 23."

(We claim this was in evidence as a fact in relation to the
58 amount realized and the manner in which it was realized and treated by the bank on the so-called E. A. Packer item.)

Allowed.

6. In paragraph 26, after the word "shares" in line 4, insert "without reserving any rights," and in line 7, before the word "transferred" insert "sold and," and in line 8, after the word "certificate" insert the words "without reserving any rights."

(We claim this because we wish it to appear with certainty that the shares were sold and transferred without any reservation, and it might be claimed as the paragraph now reads that there is no direct finding that they were sold and transferred without reservation.)

Respectfully submitted,

BROWN & PERKINS AND
WM. H. SHIELDS,
Attorneys for the Claimants.

Filed Dec. 6, 1904.

JOHN C. AVERILL, *Clerk.*

New London County Superior Court, December 7, 1904.

C. P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

Request of the State Savings Bank, the Collinsville Savings Society, The Falls Village Savings Bank, the Stafford Savings Bank, the Guilford Savings Bank, the Windham County Savings Bank, the Waterbury Savings Bank, the Southington Savings Bank and Charles P. Cogswell for Correction of the Finding Filed in said Action.

Allowed.

The above named parties request that Paragraph 16 of the finding be amended by inserting in the third line, between the word "were" and the word "assets" the following words, "except certain parcels of real estate which were included therein." The reason for
59 the above request is that there were parcels of real estate included in the $100,307.86 to which the words "in respect to the interest being past due and unpaid" could not properly apply.

Allowed.

Also that Paragraph 19 be changed by inserting in the fifth line, between the word "clerks" and the word "and" the following words "except such as were disposed of for cash." The reason of the request is that a large portion of the assets were realized on before the expiration of the bank's charter and the change is necessary to make Paragraph 19 consistent with Paragraph 20.

Allowed in Substance.

That Paragraph 21 be amended by striking out in the fifth line the words "was charged off" and the same words in the seventh line, and by inserting in each case, in lieu thereof, the words "was included in said schedule." Also the words "charged off" in the seventh and eighth lines with the same substitution. The reason for the request is that the action in regard to the two items mentioned must appear from the language of the vote of the directors and whether they were charged off or not is a question of law and is to be determined by the Court on inspection of the record of the meeting.

Allowed in Substance.

Also that there be substituted for Paragraphs 23 and 24, Paragraphs 22, 23 and 24 of the finding proposed by the above parties, because the statement of fact, as contained in the said proposed finding, is correct and these parties desire that the Court should see from what items money was realized and have in mind in that respect particularly the pieces of real estate. They also object to the use of the words "wholly charged off assets" for the same reason given above.

Sufficiently Apparent.

Also that Paragraph 15 be amended so that it shall appear that the credit to capital stock and the charging off profit and loss were a matter of bookkeeping and in order to strike a balance, and appear in the bank's report to the Comptroller of the Currency.

Memorandum Made Part of Finding.

The above parties also request that the rulings made by the Court, as stated in said parties' proposed finding, so far as
60 they are not incorporated in the Court's finding, be inserted therein, or that the rulings as stated in said proposed finding, with the additional rulings contained in the Court's finding, should all appear as rulings in the finding of the Court. The reason for this is that these parties believe that their statement in their proposed finding is an accurate draft, in substance, of the rulings that

appear in the Court's memorandum of judgment, and that any assignments of error in respect to any can be much better made by reference to the finding of the Court than to the memorandum of decision. And also because, while the finding makes a reference to the memorandum of decision, it does not expressly state as a part of the finding that the Court made the ruling contained in the memorandum. Which seems to these parties that it would be better to have all the rulings stated in one paper.

Granted.

These parties also request, although it did not appear in the proposed finding, that the Court shall incorporate in its fiding a statement that all of the certificates representing the original $300,000 of stock were, on or about July 1st, 1900, surrendered by the holders, and certificates for two-thirds of the number received. The Stock Ledger, Transfer and Certificate Books, which were in evidence, show this to be the fact.

THE STATE SAVINGS BANK,
THE COLLINSVILLE SAVINGS BANK,
THE COLLINSVILLE SAVINGS SOCIETY,
THE FALLS VILLAGE SAVINGS BANK,
THE STAFFORD SAVINGS BANK,
THE GUILFORD SAVINGS BANK,
THE WINDHAM COUNTY SAVINGS BANK,
THE WATERBURY SAVINGS BANK,
THE SOUTHINGTON SAVINGS BANK,
CHARLES P. COGSWELL,
By F. T. BROWN, *Their Attorney.*

Filed Dec. 7, 1904.

JOHN C. AVERILL, *Clerk.*

61 New London County Superior Court, December 17th, 1904.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK OF NORWICH.

Correction to Finding.

First:

For paragraph 23 in the finding as originally filed substitute the following:

23. From the assets included in said schedule "M," wholly charged off as appears therein, there has been realized in cash as follows:

From the Hurlburt real estate $1,000 with no expenses.

From the Bailey real estate $403, less $10. paid for taxes.

From the C. B. Rodgers & Co. demand loan $6,250.70 with no expense.

From the E. A. Packer demand loans $11,985.26, with no expenses.

From the T. P. Geer bill discounted of $5,226.93, $1,476.

All of said sums, together with a net balance from other assets included in said schedule and wholly charged off, making a total of $20,240, are in the hands of the receiver.

The receiver also has certain of said wholly charged off assets now in hand, which he estimates to be of the value of about $2,000.

Also add the following paragraphs:

23½. In connection with the item "Demand loan E. A. Packer" the bank, after said reduction, still carried as a part of its live assets a note of C. P. Cogswell, Trustee, for $1,187.50, which was discounted by it to pay an assessment on sundry shares of Wisconsin Western Railroad Stock, which the bank had held as collateral on the E. A. Packer loans, and subsequently on March 30, 1903, the bank realized on the sale of this stock $11,985.26 which is part of the money referred to in paragraph 23 as the proceeds of the E. A. Packer demand loan, and also from the proceeds of said stock paid off the Cogswell, Trustee, note,
62 which had been discounted to pay said assessment. This Cogswell, Trustee, note was carried as a bill discounted and entered into the loans and discounts of the bank.

24½. The term "charged off" as used in this finding in reference to the assets described in Exhibit "M" is used as a brief form of designating the action of the Bank with reference thereto, otherwise fully set forth herein, and not as a conclusion based upon any evidence not set forth herein.

The other corrections asked for, so far as allowed, have been inserted in the original copy.

GAGER, *J.*

Filed Dec. 19, 1904.

JOHN C. AVERILL, *Clerk.*

New London County Superior Court, December 20, 1904.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

Motion to Correct Finding as Re-filed by the Court.

The undersigned parties to said action severally request that Paragraph 17 of said finding be stricken out and that Paragraph 18 be amended so as to state the actual value as it appeared in evidence of the net capital of The Second National Bank at the time of the reduction of the capital stock, exclusive of the assets mentioned in the schedule incorporated in the vote of the directors, passed June 27, 1900.

The reasons for requesting the changes in respect to both will be discussed together. As Paragraph 18 now stands, the Court

has not found the actual value of the capital, applicable to stock, but has simply found the valuation at which the assets composing it were carried on the books, and the finding furnishes an opportunity to make the claim that it does not appear what the capital of the bank at the time of the reduction of the capital stock,
63 exclusive of the assets referred to in the vote of the directors of June 27, 1900, actually was, and that if such is the fact, the effect of Paragraph 17 is to find that the impairment of the capital, at the time of the reduction, required all of the assets of the bank to make the reduced capital stock worth par.

If any such construction can be put to the finding, and the request for the changes which have been made clearly indicates that such is the purpose of the parties making the request, and that it is their intention to claim that there could be no distribution because, on the face of the finding, all the capital stock was necessary to make the reduced stock worth par, and consequently there was nothing to distribute, the effect of the finding will be to misstate the facts, to give certain parties to the case the benefit of claims that were never made at the hearing, and to contradict the conclusions of the Court, as they appear in the Memorandum of Judgment.

In its Memorandum of Judgment the Court says, "It should perhaps further be stated that the reduction of the capital stock was voluntary and that after charging off the assets above referred to as bad and doubtful, the assets of the bank were still in excess of its reduced capital stock." Here is an express statement that the reduction of the capital stock to the amount of $100,000 was not all needed to meet impairment of capital, although the amount of excess of assets is not stated, but later in the memorandum the amount is stated.

We quote from Page 4, "Taking the whole evidence and record of the proceedings together, I think the reduction and charging off were to cover any impairment of the capital stock *and still leave the bank with a fair surplus of some $40,000.*" We call attention to the words underscored because they do not appear in Paragraph 17 of the finding, and if present, would give the finding a very different meaning, viz: that the reduction of the capital stock was made to cover any impairment of capital and to leave $40,000 of surplus.

We submit that Paragraph 17, as it now stands, does not
64 state correctly the conclusion of the Court. The words we have quoted from the Memorandum of Decision show also that the Court must have found that the capital of the bank applicable to stock, exclusive of the set-aside assets, was about $240,000, for otherwise there could not have been a surplus of some $40,000.

We call the Court's attention, also, to the fact that the sole testimony in the case upon this matter of value was given by Mr. Cogswell; that he stated he was familiar with the value of the bank's assets and that, excluding the set-aside assets, the capital was between $240,000 and $250,000. No attempt was made to impair his testimony upon that point, except that he was asked if

subsequently to the reduction there was a depreciation of a part of the assets to an amount somewhere between $12,000 and $15,000, and he said there was. This subsequent depreciation, it would seem from the Memorandum of Judgment, was not *considered by the Court to be evidence affecting the value of the* assets at the time of the reduction, because otherwise the Court would not have found a surplus of some $40,000.

But if it should be taken into consideration and the depreciation deducted, and the minimum figure of value given by Mr. Cogswell and the maximum figure of depreciation of the Owaneco Company's note be taken, that is to say if $15,000 be subtracted from $240,000, it still stands upon uncontradicted evidence that the capital of the bank applicable to stock, exclusive of set-aside assets, was at least $225,000, and it was not contended at the trial in the Superior Court that this was not the fact, the only claim made being, if there was such a surplus, it was legally of no consequence.

Now one of the claims of the undersigned parties made in the Superior Court was that, if any reduction of capital stock was made beyond what was necessary to meet impairment of capital, an equivalent portion of the capital must by law be distributed, and that the stockholders at the date of the reduction had a right to such distribution.

65 We submit that we should not be deprived of the benefit of this point, and we submit, also, that it should affirmatively appear in the finding, as it did appear by uncontradicted evidence and as it appeared in the Memorandum of Judgment, that the assets set aside by the Board of Directors were not required to make the reduced capital stock worth par, but that there was, without these assets, a large surplus after the reduction. As to the amount of that surplus, we have assumed upon the strength of the Memorandum of Judgment that the Court would find it to be $40,000 or thereabouts. But we do not think it necessary to make any question about the effect of the evidence as to the $12,000 to $15,000 depreciation.

We therefore ask that Paragraph 18 be so amended that it shall state that "at the time of said reduction of the bank's capital stock, the capital of the bank applicable to stock, at the valuation at which its assets were then carried on the books and at their actual value, was, exclusive of the assets mentioned in the schedule incorporated in the vote of the directors, passed June 27, 1900 (which assets also belonged to said bank at the time of said reduction), at least $225,000, but no question exists in this case as to the disposition of said surplus of $25,000."

If this finding is made, of course there is no necessity of adding anything about subsequent losses, because they are already taken into account. If, however, the Memorandum of Judgment correctly expresses the conclusion of the Court as to the value of the bank's capital, we assume that the Court will, instead of $225,000, incorporate in the finding that the value was between $240,000 and

$250,000, and then state the loss subsequently sustained on some of the assets.

It may possibly be said that inasmuch as Paragraph 18 states the book value of the assets to be between $240,000 and $250,000, *and the subsequent* loss of only $12,000 to $15,000, that it would be inferred that the difference is found as actual value, but inasmuch as the actual value appeared by uncontradicted evidence, and as the Court seems to have reached a conclusion as to the amount in its Memorandum of Judgment, we submit that we
65 have a right to an affirmative finding and should not be left to disputed inferences.

If it be said that the Memorandum of Judgment is made by reference a part of the finding, we reply first that it is open to question whether the reference does more than make the rulings a part of the finding, and if the whole Memorandum of Judgment, both as to facts and rulings, be a part of the finding, there is a contradiction then in the two parts of the finding.

The Court will remember that the fact that there was a surplus after the reduction, and without taking into consideration the sequestered assets, was one of the pivots of the case. The undersigned parties conceded that if the assets of the bank at the time of the reduction were no more than enough to make the reduced stock worth par, there was nothing to distribute, and the contention was over the law upon the fact admitted by all parties that the capital of the bank applicable to stock, without the sequestered assets, was more than sufficient to make the reduced stock worth par.

We have asked that Paragraph 17 be stricken out because the purpose of the reduction can only be ascertained from the other facts found in the case. There was no direct evidence as to the purpose, and in the nature of things, inasmuch as the stockholders did not incorporate the purpose in their vote, no direct evidence could be expected.

The purpose of the reduction, if important, may be ascertained from the action of the stockholders, the action of the Comptroller of the Currency and the financial condition of the bank at the time of the reduction. The amount of the capital of the bank and the amount of the capital stock after the reduction tell the whole story. $240,000 of capital applicable to stock and $200,000 of stock mean a surplus of $40,000, and can mean nothing else, and the reduction resulting in those two things cannot, by any possibility, be a reduction simply to meet impairment of capital.

If any finding is to be made in respect to the matter referred to in Paragraph 17, we submit the finding could only be this:
67 that "the reduction was made partly to meet impairment of the bank's capital and partly to create a surplus, and that this conclusion is based solely upon the other facts found in the case."

Then Paragraph 18, if amended so as to state the actual value of the capital applicable to stock, will show what that surplus was. We submit, therefore, that Paragraph 18 should be amended as requested above, that Paragraph 17 should be stricken out all to-

gether, but if not stricken out all together, it should read as above suggested.

Respectfully submitted,

THE STATE SAVINGS BANK,
THE SOUTHINGTON SAVINGS BANK,
THE COLLINSVILLE SAVINGS SOCIETY,
THE FALLS VILLAGE SAVINGS BANK,
THE WATERBURY SAVINGS BANK,
THE GUILFORD SAVINGS BANK,
THE STAFFORD SAVINGS BANK,
THE WINDHAM COUNTY SAVINGS BANK,
CHARLES P. COGSWELL,
By F. T. BROWN, *Their Attorney.*

Filed Dec. 21st, 1904.

JOHN C. AVERILL, *Clerk.*

New London County Superior Court, Dec. 23, 1904.

CHARLES P. COGSWELL
vs.
SECOND NATIONAL BANK.

Memorandum Concerning Correction to Finding Filed Under Date Dec. 23, 1904.

Ordinarily no motion for a correction of the finding will be considered after the time in which by statutes such motions can be made has passed. I do not understand, however, that the statute prevents the Court from making a correction where deemed needful at any time, and inasmuch as, from the finding as corrected an inference might be drawn contrary to the unquestioned facts in the case and contrary to the finding of fact upon which the Court actually based its decision, correction ought to be made in conformity with the facts.

68

As to the request in paragraph 17 I think the only ambiguity in the corrected paragraph 17 arises from the use of the term "capital"; it was not intended to be used as synonomous with capital stock. And as to the change in paragraph 18, on a re-examination of the testimony I find that Mr. Cogswell's testimony as to the actual value was quite clear, and that the finding should be as an actual valuation and not merely a book value.

GAGER, *J.*

Filed Dec. 26, 1904.

JOHN C. AVERILL, *Clerk.*

New London County Superior Court, Dec. 23, 1904.

CHARLES P. COGSWELL
vs.
SECOND NATIONAL BANK.

Correction of Finding.

Pursuant to the motion filed by the State Savings Bank and others, under date of December 20th, the finding, as re-filed December 19th, 1904, is corrected by striking out paragraphs 17 and 18 and substituting the following:

17. As a conclusion from the facts and exhibits hereinbefore set forth I find that said reduction of capital stock was made to meet the diminution in the assets of the bank caused by charging off said assets described in said schedule in the manner hereinbefore set forth, and not for the purpose of setting free any capital of the bank.

18. At the time of said reduction of the bank's capital stock the net capital of the bank applicable to stock, was exclusive of the assets mentioned in the schedule incorporated in the vote of
69 the Directors passed June 27th, 1900 (which assets also belonged to said bank at the time of said reduction), of the then actual value of between $240,000 and $250,000 but no question exists in this case as to the disposition of said then existing surplus of $40,000 to $50,000, and on the assets making up this apparent surplus losses of from $12,000 to $15,000 were suffered and charged off by the bank after the reduction of capital stock was made.

GAGER, *J.*

Filed Dec. 26, 1904.

JOHN C. AVERILL, *Clerk.*

New London County Superior Court, 29th Day of December, 1904.

CHARLES P. COGSWELL
vs.
THE SECOND NATIONAL BANK.

Appeal of the State Savings Bank, a Party to the Above Entitled Action.

In the above entitled cause, The State Savings Bank, a party thereto, appeals from the judgment of said court rendered by Gager, Judge, to the Supreme Court of Errors, next to be held within and for the Second Judicial District at Norwich on the last Tuesday of April, A. D. 1905, for a revision of the errors which it claims to have occurred in the trial thereof, and for reasons of said appeal it assigns the following:

1. The Superior Court erred in ruling that the letter of May 15th, 1900, Exhibit "F," embodied the condition on which the

reduction of the capital stock would be approved, and in not taking into consideration the other letters and the oral declarations of the Comptroller of the Currency and the Deputy and Acting Comptroller, which appear in the finding.

2. That said court erred in ruling as stated in (2) of Paragraph 32 of the finding under the heading of rulings.

3. That said court erred in ruling as stated in (3) of said Paragraph 32.

70 4. That said court erred in ruling as stated in (4) of said Paragraph 32.

5. That said court erred in ruling as stated in (5) of said Paragraph 32.

6. That said court erred in ruling that the stockholders of record at the time of the reduction of the capital stock were not as such entitled to share in the proceeds of the so-called charged off assets, and also in ruling that said assets belonged upon liquidation to the stockholders of record at the time of the expiration of the charter of the bank.

7. That said court ered in ruling that the action of the directors by their vote of June 27, 1900, was a charging off of the assets therein referred to.

8. That said court erred in ruling that there was no capital set aside by the action of the directors, taken on June 27, 1900, at the time, that there was no surplus fund created by the reduction and that there was nothing to distribute among the stockholders.

9. That said court erred in ruling, as appears in Paragraph 17 of the finding as re-filed, that said reduction of the capital stock of the bank was not made in any part for the purpose of setting free any capital of the bank.

10. That the said court erred in not ruling that the Comptroller of the Currency had a right to impose upon said The Second National Bank a requirement that, upon said reduction of its capital stock, such assets of the bank as were not required to make the capital stock of said bank as so reduced worth its par value, should be distributed to or set aside for the benefit of the holders of the stock of said bank of record at the date of said reduction of its capital stock, or disposed of in such way that said stockholders should have the benefit of said assets and their net proceeds, and that said Comptroller had a right to make such requirement a condition

71 of his approval of said reduction of the capital stock of said bank; that it was not necessary that said requirement or condition should be incorporated in the Comptroller's certificate of approval of such reduction of the capital stock. That the Comptroller of the Currency did impose such requirment and did make such condition of his approval of said reduction of the capital stock, and that the appropriation of the assets of said bank, mentioned in the schedule incorporated in the vote of the directors of said bank, passed June 27, 1900, for the benefit of the holders of the stock of said bank at the date of said reduction, to wit; June 9th, 1900, and the action taken by said directors, as appears by their said vote of June 27th, 1900, were required by and in compliance with said requirement of the Comptroller of the Currency.

11. That the court erred in not ruling that, independently of any requirement thereof by the Comptroller of the Currency, the law is such that it was the right and also the duty of said bank and its directors to distribute among the holders of the stock of said bank at the date of said reduction of its capital stock such part of the assets of said bank as were not necessary to make the capital stock as so reduced worth its par value, or to set aside and appropriate them to the benefit of said holders in proportion to their respective holdings on the date of said reduction, and that it was the right and also the duty of the directors of said bank to set aside and hold in trust for the stockholders of record on the date of said reduction of the capital stock, to wit: June 9th, 1900, the assets mentioned in the schedule incorporated in said vote of the directors, passed June 27th, 1900, and to distribute whatever might be realized from said assets from time to time, as might be reasonable, among said stockholders in proportion to their respective holdings on said date.

12. That the court erred in not ruling that the amount of the reduction of the capital stock of said bank was in excess of the amount of the reduction required to meet any impairment thereof, and that such excess of reduction caused an equivalent portion of
72 the capital of said bank to be set free and that the holders of the stock of said bank at the date of said reduction had a right to have such capital distributed among them or in some lawful way returned to them or appropriated to their benefit in proportion to their respective holdings.

13. That the court erred in not ruling that, independently of any action of the Comptroller of the Currency requiring such distribution, and independently of said action of the bank and its directors, appears by the vote of June 27th, 1900, the holders of the stock of said bank of record at the date of said reduction of its capital stock have, and each of them has, the right in this action to an order of the Superior Court appropriating to their benefit the net of each of the assets mentioned in said schedule incorporated in the vote of the directors, passed June 27th, 1900, and the proceeds of any of said assets that have been or may be disposed of, so far as said assets or their proceeds are in the possession of the receiver appointed in this action, and to an order of the court that the net of said assets or their proceeds be distributed or paid over at the proper time by said receiver to the holders of the capital stock of said bank of record at the date of said reduction, in proportion to their respective holdings on said date.

14. That the court erred in not ruling that the action taken by the directors of said The Second National Bank, as appears in their said vote, passed June 27th, 1900, was lawful and lawful in respect to each of the assets mentioned in the schedule incorporated in said vote, That said vote and action of the directors is binding according to its terms, and that the effect of said vote is to give to the holders of the stock of said bank of record at the date of said reduction of the capital stock, to wit: June 9, 1900,

the beneficial right and interest in each of the assets mentioned in the schedule incorporated in said vote, with the right to have each of said assets and their proceeds distributed among them according to the terms of said vote.

73 15. That the court erred in not ruling that this party, as a holder of the stock of said bank of record at the date of said reduction, is entitled to a share of the net proceeds of the assets mentioned in the schedule incorporated in the vote of the directors of the bank of date June 27, 1900, so far as said assets or their proceeds are in the possession of the receiver in this action, and that said share is in the proportion of its holdings on said date to the entire capital stock of said bank on said date and prior to the reduction.

16. If, in the opinion of the court, the statement in Paragraph 17 of the finding as re-filed, that the reduction of the capital stock of the bank was "not for the purpose of setting free any capital of the bank" is a finding of fact, the appellant claims that the conclusion is not warranted legally by the facts and exhibits referred to in said paragraph but is in contradiction of the other facts found in said paragraph and of the facts and exhibits referred to in said paragraph as "hereinbefore set forth," and should be stricken out.

17. That the court erred in holding that the proceeds of the charged off assets, referred to in said application, belonged to the bank as a corporation, and upon its liquidation, to the stockholders who may be entitled to a distribution of the funds of said bank upon a winding up, according to law.

18. That the court erred in ordering that the proceeds of the assets of said bank of the face value of $100,307.86, as enumerated and specifically described in the vote of the directors of said bank, dated June 27, 1900, the same being the assets of said bank charged off upon the reduction of the capital stock of said bank from $300,000 to $200,000, which said proceeds now consist of about $20,490.70 in cash and unsold assets of the estimated value of $2,000, belong to and are the property of said bank and are to be distributed, as a part of the capital of said bank, to the stockholders of record at the time of the expiration of the charter of said bank, or their lawful assignees, as such capital remaining

74 upon the settlement of the affairs of a National Bank is by law to be distributed among its stockholders.

It therefore prays for such relief as is provided by law in the premises.

THE STATE SAVINGS BANK,
By F. T. BROWN, *Its Attorney.*

I certify that the foregoing appeal was filed on the 29th day of December, A. D. 1904 and that Frank T. Brown, of Norwich, is recognized in the sum of $100.00, conditioned that the said The State Savings Bank shall prosecute said appeal to effect and pay all costs therein, if it shall fail to do so; and said appeal is hereby allowed.

JOHN C. AVERILL, *Clerk.*

NOTE BY CLERK.—Similar appeals were filed and allowed, by
The Collinsville Savings Society.
The Falls Village Savings Bank.
The Stafford Savings Bank.
The Guilford Savings Bank.
The Windham County Savings Bank.
The Waterbury Savings Bank.
The Southington Savings Bank.

NOTE BY CLERK.—An appeal in the same words was filed by Charles P. Cogswell, with the exception of the 13th and 15th reasons of appeal, which read as follows:

13. That the court erred in not ruling that, independently of any action of the Comptroller of the Currency requiring such distribution, and independently of said action of the bank and its directors, as appears by the vote of June 27th, 1900, the holders of the stock of said bank of record at the date of said reduction of its capital stock have, and each of them has, the right in this action to an order of the Superior Court appropriating to their benefit the net of each of the assets mentioned in said schedule incor-
75 porated in the vote of the directors, passed June 27th, 1900, and the proceeds of any of said assets that have been or may be disposed of, so far as said assets or their proceeds are in the possession of the receiver appointed in this action, and to an order of the court that the net of said assets or their proceeds be distributed or paid over at the proper time by said receiver to the holders of the capital stock of said bank of record at the date of said reduction, in proportion to their respective holdings on said date, and in not holding that, in case of the assignment of the rights of such stock holders to this party, such distribution should be made to him as assignee.

15. That the court erred in not ruling that this party, as a holder of the stock of said bank of record at the date of said reduction, is entitled to a share of the net proceeds of the assets mentioned in the schedule incorporated in the vote of the directors of the bank of date June 27, 1900, so far as said assets or their proceeds are in the possession of the receiver in this action, and that said share is in the proportion of its holdings on said date to the entire capital stock of said bank on said date and prior to the reduction; and in not ruling that, as assignee for value of all the rights in said assets of parties who were holders of the stock of said bank on the date of said reduction to the amount of 1,472 shares in the aggregate, this party is also entitled to a share of said assets in the possession of said receiver and their proceeds ,to be determined in like manner.

He therefore prays for such relief as is provided by law in the premises.

CHARLES P. COGSWELL,
By F. T. BROWN,
His Attorney.

I certify that the foregoing appeal was filed on the 29th day of December, A. D. 1904, and that Frank T. Brown, of Norwich, is recognized in the sum of $100.00, conditioned that the
76 said Charles P. Cogswell shall prosecute said appeal to effect and pay all costs therein, if he shall fail to do so; and said appeal is hereby allowed.

JOHN C. AVERILL, *Clerk.*

A correct copy of record of the Superior Court, to be printed.
Attest,

JOHN C. AVERILL, *Clerk.*

A true copy of the record in said cause, to be used in the trial in the Supreme Court of Errors.
Attest,

JOHN C. AVERILL, *Clerk.*

JOHN C. AVERILL, *Clerk.*

77 At a Supreme Court of Errors, in the Second Judicial District, holden at Norwich, in the County of New London, in the State of Connecticut, on the last Tuesday of April, 1905.

CHARLES P. COGSWELL, of Norwich, Conn.,
vs.
THE SECOND NATIONAL BANK OF NORWICH, CONN.

On Appeal from the Superior Court, New London County. No. 6.

This appeal by the plaintiff claiming error in the process, record, and judgment and in the proceedings and decisions of the Court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts on file in this Court, was allowed by the Clerk of the Superior Court for New London County on the 29th day of December, 1904, and came to this Court at its session at Norwich, on the last Tuesday of April, 1905; when the parties appeared and were fully heard.

And now this Court finds that in the record judgment and proceedings of said Superior Court there is error and the order appealed from is reversed, with directions to enter an order for a distribution in conformity with the opinion on file.

78 It is therefore considered and adjudged that the said judgment be reversed and the appellants recover of the appellees $— costs of suit and that the said Superior Court take further proceedings therein in conformity with the opinion as on file.

By the Court,

JOHN C. AVERILL, *Clerk.*

79 All of which I have caused by these presents to be Exemplified, and the Seal of the Supreme Court of Errors of the State of Connecticut to be hereunto affixed, and do hereby certify that the within and foregoing is a true copy of said original Files and Record.

In testimony whereof, I hereunto set my hand, and affix the Seal of said Court, at Norwich, in said District and State, this 20th day of June, 1905.

[Seal Supreme Court of Errors, Conn.]

JOHN C. AVERILL, *Clerk.*

STATE OF CONNECTICUT, *Supreme Court of Errors, ss:*

I, David Torrance, Chief Justice of the Supreme Court of Errors of the State of Connecticut, do hereby certify, that John C. Averill, whose name is subscribed to the preceding exemplification is Clerk of the said Supreme Court of Errors in and for the said Second Judicial District, duly appointed and sworn; that the above is
80 his genuine official signature, and that full faith and credit are due to his official acts. I further certify, that the Seal affixed to said exemplification is the Seal of the said Supreme Court of Errors, and that the foregoing attestation is in due form.

Dated at New Haven, this 20th day of June, 1905.

DAVID TORRANCE,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

STATE OF CONNECTICUT,
Supreme Court of Errors, Second Judicial District, ss:

I, John C. Averill, Clerk of said Court, do hereby certify that Honorable David Torrance, whose name is subscribed to the preceding certificate, is the Chief Justice of the Supreme Court of Errors of the State of Connecticut, duly appointed and qualified; and that the signature of the said Chief Justice to said certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court this 21st day of June, 1905.

[Seal Supreme Court of Errors, Conn.]

JOHN C. AVERILL, *Clerk.*

81 Supreme Court of Errors, Second Judicial District, April Term, 1905.

COGSWELL
v.
SECOND NATIONAL BANK.

Appeal from an order and decree of the Superior Court in New London County, Gager, J., in receivership proceedings, distributing the cash proceeds of certain assets of a national bank which had been charged off upon a reduction of its capital stock.

Frank T. Brown, for the appellants (Charles P. Cogswell *et al.*).
Donald G. Perkins, with whom was *William H. Shields,* for the appellees (F. S. Jerome *et al.*).

BALDWIN, *J.:*

This appeal respects the disposition of the special fund to which reference was made in Cogswell *v.* Second National Bank, 76 Conn. 252, 255, 261. It was held in that case that if that fund had been, as alleged, set apart by direction of the comptroller of the currency, for the benefit of those who were shareholders of the bank at the time when its capital was reduced, a valid trust in their favor was thus created.

The facts attending the transaction have now been fully found by the Superior Court.

The directors having voted to recommend a reduction of the capital stock of the bank from $300,000 to $200,000, were advised by the comptroller of the currency that it would be approved "provided so much of the amount as is necessary is used to charge off
82 bad, doubtful and unproductive assets, the difference only being paid to the shareholders in cash," and that "the shareholders of a national bank, upon a reduction in capital stock, are entitled to either receive the cash or the charged off assets, and neither can be withheld without their consent." The comptroller also said to the president of the bank, in reference to the same matter, "the assets belong to the stockholders of record, and a trust fund must be created, so that those assets may be distributed among the stockholders of record, when your capital is reduced." The stockholders then, in May, 1900, voted to make the reduction, without any specification of the mode of accomplishing it; but the president, in asking the approval of this action by the comptroller, filed with him a written statement that "the whole amount of the reduction, viz., $100,000 will be used for the purpose of charging off bad, doubtful and unproductive assets; no money to be paid to the shareholders unless realized from said assets, which are to be set aside and collected for the benefit of the shareholders of record at date of the issuance of the comptroller's certificate, approving the reduction." It was understood that this statement was to be replaced by one from the directors; and on the faith of this understanding a certificate, on

June 9th, was given by the comptroller approving the reduction, without any qualifications. The directors subsequently sent him a statement, in conformity with the understanding, dating it back to June 9th. On June 27th a schedule of certain assets of
83 the bank, each item being given valuation, and the total valuations of all amounting to $100,307.86, was presented to the directors, who thereupon voted that the assets so scheduled, "which assets are considered either bad or doubtful, and on account of which the capital stock of the bank has been reduced from $300,000 to $200,000, be set aside from the other assets of the bank and be held by it in trust for the stockholders of record on the 9th day of June, 1900; and that whatever may be realized from said assets be distributed from time to time, as may be reasonable, among said stockholders in proportion to their respective holdings on said date."

Thereupon the account with capital stock on the books of the bank was credited with a reduction of $100,000, and the items named in the schedule above described were charged to the account of Profit and Loss at the valuation of $100,307.86. Some of the items were of real estate; the rest were all secured; and all were those referred to in the directors' statement to the comptroller dated June 9th.

This left the bank with good assets worth over $240,000.

The bank thereafter, until its charter expired in 1903, kept a separate account relating to the assets included in the schedule, entitled "Stockholders' Trust," in which were credited all collections and charged all expenditures arising in connection with endeavors to realize upon them.

Two of the scheduled items represented claims for a larger amount; the valuation affixed to each representing the estimated loss upon it. The same claims were also entered in the books of the
84 bank, as part of its remaining capital, at a valuation for each equal to the difference between its face and the valuation assigned to it in the schedule.

The receiver has received $20,240 on account of the scheduled assets. Some of them also remain uncollected, but have a value. To one of the items, entered as "Demand loans, E. A. Packer, $15,647.50," belonged certain railroad stock held as collateral security. A note for over $1,000, made by "C. R. Cogswell, trustee," and discounted by the bank to pay an assessment on this stock, was included in the reduced capital of $200,000, and in March, 1903, was paid off from the proceeds of sales of the stock; leaving a balance of such proceeds, which was included in the $20,240 above mentioned.

All the certificates representing the shares in the original capital were, on or about July 1st, 1900, exchanged by the holders for certificates in favor of each for two thirds of the number of his original shares.

As a conclusion from all these facts it was found by the trial court that the "reduction of capital stock was made to meet the diminution in the assets of the bank caused by charging off said assets described in said schedule in the manner hereinbefore set forth, and not for

the purpose of setting free any capital of the bank," whereupon an order was made that the assets included in the schedule of June 27th, 1900, and their proceeds belonged to the bank and should be distributed to those who were shareholders at the expiration of its charter.

The subordinate facts which have been detailed do not
85 justify these ultimate conclusions, either of fact or law.

The reduction of capital stock was accomplished before the assets described in the schedule were charged off. It was accomplished by a vote of the shareholders, approved by the comptroller of the currency, and his approval was only secured by the assurance of the president and directors that certain bad, doubtful and unproductive assets would be charged off and set aside for the benefit of those who were shareholders at the date of such approval. It is of no consequence in this proceeding that the certificate of approval did not refer to these assurances. It is enough that it was given because of them. What was thus promised the directors did. They had the right to do it. U. S. Rev. Stat., § 5145. The bank was not being wound up. The directors' vote was simply a form of declaring a dividend from assets in excess of the capital stock. Smith *v.* Dana, 77 Conn. 543, 554. The right to receive what might ultimately be realized from the fund thus set apart because therefore irrevocably vested in those who were shareholders on June 9th, 1900, and they or their assigns are now entitled to whatever is to be distributed from it.

Directors of national banks can declare dividends only out of net profits. U. S. Rev. Stat., §§ 3199, 5204. It is contended that the funds set apart in this case did not consist of net profits. Technically this is true. But it was the equivalent of net profits within the meaning of these statutory provisions, which were intended
simply to preserve the capital stock intact, and to provide
86 for turning a part of the net profits into a surplus fund, to be accumulated until it equaled twenty per cent. of the capital stock. Such a surplus fund existed in case of the bank whose affairs are being wound up in this proceeding, at the time when the fund now in question was set apart for distribution. Whether if no provision in regard to the assets charged off had been made by the directors and with the approval of the comptroller, in the nature of the declaration of a dividend, whatever might have been thereafter realized from them would have belonged to those then shareholders in the bank, we need not inquire. See Seeley *v.* New York National Bank, 8 Daley, 400, 78 N. Y. 608; Strong *v.* Brooklyn Cross-Town R. Co., 93 N. Y., 426; McCann *v.* First National Bank, 112 Ind. 433, 14 Northeastern Rep. 251; 131 Ind. 95, 30 Northeastern Rep. 893. With his approval, whatever it was not necessary to retain as capital, or to form a surplus fund, might certainly, with the assent and by vote of the directors, be returned to the shareholders; and if a dividend were ordered then, it might be made payable thereafter, and only on the contingency of future collections.

There was no impropriety in placing in the schedule at a certain valuation claims which were also and primarily retained at another

and lesser valuation as part of the capital stock. If a note for $2,000 had been discounted on the faith of collateral security which was certainly worth $500 and might be worth more, there could be no legal objection to charging off $1,500 from the book valuation of the loan and embracing it at a valuation of $1,500 in
87 doubtful assets set aside for the purpose of an ultimate dividend, while also carrying it along at a valuation of $500, as part of the assets representing the capital stock. In such case what would be really set aside would be not the note, but an interest in any collections on account of it in excess of $500.

Certain of those who were shareholders on June 9th, 1900, have since transferred their shares. Such transfers (notwithstanding U. S. Rev. Stat., § 5139) did not pass the right to any interest in the special trust fund created on that day. A dividend declared by the directors of a corporation in favor of those who are then its shareholders, though payable at a future date, severs the fund to be so distributed from the assets of the corporation. The share of each of the payees so named thereupon vests in him as an individual, and he does not lose it on ceasing to be a shareholder. Beers *v.* Bridgeport Spring Co., 42 Conn. 17, 24; Second Universalist Church *v.* Colegrove, 74 Conn. 79, 84.

It follows also from the same considerations that those who were shareholders on June 9th, 1900, could at any time thereafter transfer their rights in the special trust fund, whether with or without a transfer of their shares.

There is error and the order appealed from is reversed, with directions to enter an order for a distribution in conformity with this opinion.

In this opinion the other judges concurred.

The foregoing is a true copy of the original opinion as filed with the reporter of the court; but the opinion is subject to alteration and addition by the judges until printed in the official reports.

JAMES P. ANDREWS, *Reporter.*

88 [Endorsed:] Cogswell *vs.* Second National Bank.

89 STATE OF CONNECTICUT:

Supreme Court of Errors, Second Judicial District, New London County, April Term, 1905.

CHARLES P. COGSWELL
vs.
SECOND NATIONAL BANK, LEWIS SPERRY, Receiver.

CHARLES P. COGSWELL, STATE SAVINGS BANK, COLLINSVILLE SAVINGS SOCIETY, FALLS VILLAGE SAVINGS BANK, STAFFORD SAVINGS BANK, GUILFORD SAVINGS BANK, WINDHAM COUNTY SAVINGS BANK, WATERBURY SAVINGS BANK, and SOUTHINGTON SAVINGS BANK, Corporations, Claimants, Appellants,
vs.
FRANKLIN S. JEROME, D. L. UNDERWOOD, ANDREW RADEL, IRA L. PECK, H. N. GALLUP, R. W. PERKINS, STONINGTON SAVINGS BANK, and M. EUGENE LINCOLN, Claimants, Appellees.

Assignment of Errors.

Now comes the above appellee, Franklin S. Jerome, and files herewith his petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment:

The Supreme Court of Errors of Connecticut erred in holding and deciding that Frankling S. Jerome, one of the appellees, as a shareholder in the Second National Bank, a banking association created by and organized under the statute of the United States known as the National Bank Act, was not entitled to his proportionate share as such shareholder in the so-called charged off assets and proceeds thereof, a part of the capital of said bank,—a right and
90 privilege specially claimed by said Franklin S. Jerome, under said statutes of the United States, and especially under Sections 5132, 5134, 5136, 5139, 5143, 5145, 5199, and 5204 thereof—and in holding that there was error in the judgment of the Superior Court in favor of said Franklin S. Jerome on said claims, and in reversing said judgment.

Said errors are more particularly set forth as follows:

Said Court erred in holding and deciding,

First. That the comptroller of the currency under the Acts of Congress, the Banking Laws of the United States, and especially under Sec. 5143, had any power to order the directors, as a condition to his approval of the reduction of capital of said bank, to return to or set apart in trust for the stockholders of record said charged off assets, as was done in the directors' vote of June 27th, 1900.

Second. That the certificate of approval by the comptroller of the currency of said reduction, issued and dated June 9th, 1900, Exhibit "K," was not absolute and unconditional, but was issued on the condition that the directors of said bank would charge off certain bad,

doubtful, and unproductive assets and set them aside for the benefit of the shareholders at the date of such approval.

Third. That the directors had the power under Sections 5145, 5199, 5204, or under any other provisions of said National Bank Act to pass the vote of June 27th, 1900, Exhibit "M" and thereby separate said assets from the capital of said bank and set them apart for the stockholders of record and create said trust fund; and in ruling that the result and effect of said vote was to create a trust fund in said assets for the benefit of stockholders of record and divert the same from the capital of said bank and from the owners of the shares in said capital.

Fourth. That the vote of the directors of June 27th, 1900, Exhibit "M," was the declaration of a dividend from assets in
91 excess of the capital stock, and that said assets were equivalent to net profits within the meaning of Sections 3199 and 5204 of said National Bank Act and that the directors had power under said Sections or any provisions of said Bank Act to pass said vote, set apart said assets as therein provided, and declare such dividend.

Fifth. That the right to receive what might ultimately be realized from the assets and fund set apart by said vote of said directors became irrevocably vested in those who were shareholders on June 9th, 1900, apart from their continued ownership of stock in said bank and that the sale and transfer of their shares in said capital stock, without reservation, did not transfer and that the said Franklin S. Jerome had not acquired by such transfer and the issue to him of new certificates therefor by said bank, all the rights of said prior holders, including the right to said charged off assets, under Section 5139 of the United States Revised Statutes.

For which errors the said Franklin S. Jerome prays that the judgment of the said Supreme Court of Errors, dated June —, 1905, be reversed, and a judgment entered for the appellee, Franklin S. Jerome and for costs.

DONALD G. PERKINS,
Attorney for Franklin S. Jerome.

92 STATE OF CONNECTICUT:

Supreme Court of Errors, Second Judicial District.

C. P. COGSWELL
vs.
SECOND NATIONAL BANK.

Notice.

To D. L. Underwood, Andrew Radel, Ira L. Peck, H. H. Gallup, R. W. Perkins, M. Eugene Lincoln, and the Stonington Savings Bank:

I hereby notify you, as the several appellees jointly with myself in the appeal taken by the State Savings Bank in the above entitled

matter as a claimant to and in relation to the ownership of the so-called charged off assets of said bank, that I desire and intend to sue out a writ of error from the decision in said case to the United States Supreme Court, and hereby request you, as jointly interested as co-claimants with myself to said fund, and as appellees in said appeal, to join with me in prosecuting said writ of error.

Dated at Norwich, June 13th, 1905.

FRANKLIN S. JEROME.

We severally acknowledge receipt of the above and foregoing notice and now severally refuse to join in prosecuting said writ of error.

Dated at Norwich, June 13th, 1905.

DWIGHT L. UNDERWOOD.
IRA L. PECK.
H. H. GALLUP.
R. W. PERKINS.
ANDREW RADEL.

M. EUGENE LINCOLN.
THE STONINGTON SAVINGS BANK,
By D. B. SPALDING, *Treas'r.*

93 STATE OF CONNECTICUT:

Supreme Court of Errors, Second Judicial District, New London County, April Term, 1905.

CHARLES P. COGSWELL
vs.
SECOND NATIONAL BANK, LEWIS SPERRY, Receiver; CHARLES P. COGSWELL, STATE SAVINGS BANK, COLLINSVILLE SAVINGS SOCIETY, FALLS VILLAGE SAVINGS BANK, STAFFORD SAVINGS BANK, GUILFORD SAVINGS BANK, WINDHAM COUNTY SAVINGS BANK, WATERBURY SAVINGS BANK, and SOUTHINGTON SAVINGS BANK, Corporations, Claimants, Appellants,
vs.
FRANKLIN S. JEROME, D. L. UNDERWOOD, ANDREW RADEL, IRA L. PECK, H. H. GALLUP, R. W. PERKINS, STONINGTON SAVINGS BANK, and M. EUGENE LINCOLN, Claimants, Appellees.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the Supreme Court of Errors in rendering judgment against him in the above entitled case, the defendant, Franklin S. Jerome, hereby prays a writ of error from the said decision and judgment, to the Supreme Court of the United States, and submits an assignment of errors herewith.

DONALD G. PERKINS,
Attorney for F. S. Jerome, Appellee.

STATE OF CONNECTICUT, *Supreme Court of Errors, ss:*

Let the writ of error issue upon the execution of a bond by F. S. Jerome to Charles P. Cogswell, The State Savings Bank, The
94 Collinsville Savings Society, The Falls Village Savings Bank, The Stafford Savings Bank, The Guilford Savings Bank, The Windham County Savings Bank, The Waterbury Savings Bank, The Southington Savings Bank, and Lewis Sperry, Receiver of The Second National Bank, in the sum of Twenty Five Thousand Dollars; said bond when approved to act as a supersedeas.

Dated June 20th, 1905.

DAVID TORRANCE,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

[Endorsed:] Charles P. Cogswell *v.* Second National Bank. Petition for writ of error.

95 Supreme Court of the United States.

No. —.

FRANKLIN S. JEROME, Plaintiff in Error,
vs.
CHARLES P. COGSWELL ET AL., Defendants in Error.

Bond.

Know all men by these presents, That we, Franklin S. Jerome of Norwich, Connecticut, as principal, and Charles Bard and J. Hunt Smith, both of said Norwich, as sureties, are held and firmly bound unto Charles P. Cogswell, The State Savings Bank, The Collinsville Savings Society, The Falls Village Savings Bank, The Stafford Savings Bank, The Guilford Savings Bank, The Windham County Savings Bank, The Waterbury Savings Bank, The Southington Savings Bank, and Lewis Sperry, Receiver of The Second National Bank, Defendants in Error, in the sum of Twenty Five Thousand Dollars, to be paid to the said obligees, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Signed with our seals, and dated this 16th day of June, 1905.

Whereas, the above-named plaintiff in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of Errors of the State of Connecticut,

Now, therefore, The condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

FRANKLIN S. JEROME. [L. S.]
CHAS. BARD. [L. S.]
J. HUNT SMITH. [S. L.]

Signed, sealed and delivered in presence of
DONALD G. PERKINS.

The above bond is approved.
June 20th 1905.

DAVID TORRANCE,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

[Endorsed:] Copy Bond.

96 The original of the foregoing supersedeas bond was lodged with the clerk of the Supreme Court of Errors of the State of Connecticut, Second Judicial District, on June 21st, 1905, and the following endorsement made thereon: "Bond. Filed, June 21st, 1905.—John C. Averill, Clerk of Supreme Court of Errors of Connecticut, Second Judicial District."

97 The original of the foregoing writ of error was lodged with the clerk of the Supreme Court of Errors of the State of Connecticut, Second Judicial District, on June 21st, 1905, and also at the same time and place a copy thereof for each one of the defendants, Charles P. Cogswell, The State Savings Bank, The Collinsville Savings Society, The Falls Village Savings Bank, The Stafford Savings Bank, The Guilford Savings Bank, The Windham County Savings Bank, The Waterbury Savings Bank, The Southington Savings Bank, and Lewis Sperry, Receiver of The Second National Bank. One of said copies being addressed personally to each of the defendants respectively. The following endorsement was made upon the said original writ and upon each copy: "Writ of Error received and filed, June 21st, 1905. John C. Averill, Clerk of Supreme Court of Errors of Connecticut, Second Judicial District."

98 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Charles P. Cogswell, The State Savings Bank, The Collinsville Savings Society, The Falls Village Savings Bank, The Stafford Savings Bank, The Guilford Savings Bank, The Windham County Savings Bank, The Waterbury Savings Bank, The Southington Savings Bank, and Lewis Sperry, Receiver of the The Second National Bank, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., on the 19th day of July, A. D. 1905, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of Errors of the State of Connecticut, wherein Franklin S. Jerome is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of Errors of the State of Connecticut, this 20th day of June, 1905.

[Seal Supreme Court of Errors, Conn.]

DAVID TORRANCE,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

NORWICH, CONN., *June 20th*, 1905.

We hereby acknowledge due service of the above citation.

LFWIS SPERRY, *Receiver.*
F. T. BROWN,
Attorney for All Defendants in Error Named Above Except Lewis Sperry.

[Endorsed:] Citation.

99 UNITED STATES OF AMERICA,
Supreme Court of Errors of Connecticut, Second Judicial District, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly authenticated transcript of the complete record and proceedings in the within entitled case, with all things concerning the same, with the exception that the opinion of the Supreme Court of Errors is certified to by James P. Andrews, Reporter, and not by the Clerk of the Supreme Court of Errors, Second Judicial District.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Errors of Connecticut, Second Judicial District, in the City of Norwich, this 14 day of July, 1905.

[Seal Supreme Court of Errors, Conn.]

JOHN C. AVERILL,
Clerk of Supreme Court of Errors of Connecticut, Second Judicial District.

[Endorsed:] From John C. Averill, Clerk, Norwich, Ct.

Endorsed on cover: File No. 19,847. Connecticut sup. court of errors. Term No. 80. Franklin S. Jerome, plaintiff in error, *vs.* Charles P. Cogswell, The State Savings Bank *et al.* Filed July 17th, 1905. File No. 19,847.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 80.

Office Supreme Court U.S.
FILED
NOV 1 1906
JAMES H. McKENNEY

FRANKLIN S. JEROME,
Plaintiff in Error,

vs.

CHARLES P. COGSWELL, THE STATE SAVINGS BANK, ET AL.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

BRIEF OF PLAINTIFF IN ERROR.

WM. H. SHIELDS,
DONALD G. PERKINS,
of Counsel.

BULLETIN PRINT, NORWICH, CONN.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 80.

FRANKLIN S. JEROME,
Plaintiff in Error,

vs.

CHARLES P. COGSWELL, THE STATE SAVINGS BANK, ET AL.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

BRIEF OF PLAINTIFF IN ERROR.

WM. H. SHIELDS,
DONALD G. PERKINS, } *of Counsel.*

STATEMENT OF CASE.

The Second National Bank of Norwich, Connecticut, was a banking association organized and existing under the banking laws of the United States and after its charter expired by lapse of time February 24th, 1904, its affairs were being settled in the manner provided by law when a complaint in equity against the Bank was brought by a stockholder to the Superior Court of Connecticut asking for the appointment of a receiver to wind up its affairs, and this proceeding resulted in the appointment of a permanent receiver. (See original record in the case made a part of the record in this case by stipulation. Record, page 2.)

The Receiver after his appointment while proceeding in the settlement of its affairs, filed his petition with the Court (see Record, page 3), stating that on May 24th, 1900, the capital stock of the bank was reduced from $300,000 to $200,000, and that at the time of and in connection with the reduction, assets of the face value of $101,000 were charged off and set aside; and that a question has arisen as to whether the proceeds of said assets be distributed to the stockholders of record at the time of said reduction or to the present stockholders and praying for an order to all stockholders at the time of said reduction and to all the present stockholders to appear and be heard relative to the ownership and distribution of said charged off assets.

Such orders were passed by the Court and due notice to such stockholders given and return made. (See Record, pages 4-6.)

The State Savings Bank and other stockholders (now defendants in error) representing 638 of the original 3000 shares appeared and filed claims to the charged off assets by virtue of their ownership of original stock when capital was reduced. (See Record, pages 10-13, for claims.)

C. P. Cogswell also filed a claim as the owner by written assignment of rights to the charged off assets, represented by 14/5 shares of old stock (see Record, pages 14-16), but the stock itself had been surrendered and new stock issued and that again transferred without reservation.

Franklin S. Jerome (plaintiff in error) and others, representing 1021 shares of the bank after the reduction, appeared and filed written claims to the charged off assets as a part of the capital stock of the bank to be distributed to them *pro rata*. (See Record, page 17, for claims.)

The Superior Court after a trial decided in favor of Franklin S. Jerome (plaintiff in error) et al., that the assets belonged to and were the property of the bank and should be distributed to the stockholders of record at the expiration of its charter. (See Record for judgment, p. 20, and memorandum of decision, pages 18-20.)

The State Savings Bank, et al., appealed to the Supreme Court of Errors, which rendered judgment that the stockholders of record at time of reduction were entitled to the charged off assets, and reversed the judgment of the Superior Court.

To reverse this judgment of the Supreme Court of Errors, Franklin S. Jerome has sued out this writ of error, the other like claimants to simplify the record having on notice refused to join in the writ. (Record, pages 59-60.)

SPECIFICATION OF ERRORS.

The Supreme Court of Errors of Connecticut erred in holding and deciding that Franklin S. Jerome, one of the appellees, as a shareholder in the Second National Bank, a banking association created by and organized under the statutes of the United States known as the National Bank Act, was not entitled to his

proportionate share as such shareholder in the so-called charged off assets and proceeds thereof, a part of the capital of said bank—a right and privilege specially claimed by said Franklin S. Jerome, under said statutes of the United States, and especially under Sections 5133, 5134, 5136, 5139, 5143, 5145, 5199 and 5204 thereof—and in holding that there was an error in the judgment of the Superior Court in favor of said Franklin S. Jerome on said claims, and in reversing said judgment.

Said errors are more particularly set forth as follows:

Said Court erred in holding and deciding,

First. That the comptroller of the currency under the Acts of Congress, the Banking Laws of the United States, and especially under Section 5143, had any power to order the directors, as a condition to his approval of the reduction of capital of said bank, to return to or set apart in trust for the stockholders of record said charged off assets, as was done in the directors' vote of June 27th, 1900.

Second. That the certificate of approval by the comptroller of the currency of said reduction, issued and dated June 9th, 1900, Exhibit "K," was not absolute and unconditional, but was issued on the condition that the directors of said bank would charge off certain bad, doubtful, and unproductive assets and set them aside for the benefit of the shareholders at the date of such approval.

Third. That the directors had the power under Sections 5145, 5199, 5204, or under any other provisions of said National Bank Act to pass the vote of June 27, 1900, Exhibit "M," and thereby separate said assets from the capital of said bank and set them apart for the stockholders of record and create said trust fund; and in ruling that the result and effect of said vote was to create a trust fund in said assets for the benefit

of stockholders of record and divert the same from capital of said bank and from the owners of the shares in said capital.

Fourth. That the vote of the directors of June 27, 1900, Exhibit "M," was the declaration of a dividend from assets in excess of the capital stock, and that said assets were equivalent to net profits within the meaning of Sections 5199 and 5204 of said National Bank Act, and that the directors had power under said Sections or any provisions of said Bank Act to pass said vote, set apart said assets as therein provided, and declare such dividend.

Fifth. That the right to receive what might ultimately be realized from the assets and fund set apart by said vote of said directors became irrevocably vested in those who were shareholders on June 9th, 1900, apart from their continued ownership of stock in said bank and that the sale and transfer of their shares in said capital stock, without reservation, did not transfer, and that the said Franklin S. Jerome had not acquired by such transfer and the issue to him of new certificates therefor by said bank, all the rights of said prior holders, including the right to said charged off assets, under Section 5139, of the United States Revised Statutes.

BRIEF OF ARGUMENT.

THIS WRIT OF ERROR PRESENTS QUESTIONS WITHIN THE JURISDICTION OF THIS COURT UNDER U. S. REV. STATUTES, SEC. 709.

The record in the finding of facts (page 22) shows that the Second National Bank, the defendant in the original action in the State Court, in which a receiver was appointed, was a banking association existing and incorporated under the laws of the United States known as the National Bank Act; that the Court

on the application of the receiver after notice to persons who were stockholders of record when the capital of the bank was reduced, and to all present stockholders who were stockholders at the expiration of the charter of the bank, decided that certain assets were a part of the capital of the bank and should be distributed to the stockholders at expiration of charter by virtue of their stock certificates representing a proportionate interest in the capital.

The present plaintiff in error was one of such stockholders, holding 1021 shares, and the decision sustained his right claimed under his stock certificate issued by a National Bank under the laws of the United States, and determined in his favor as incidental thereto the claims made by him that the directors had no power under the National Bank Act to set aside the assets as attempted by the vote when the capital was reduced, that such vote had no such effect and was not the declaration of a dividend authorized by such laws, and that the surrender of the old certificates and the issuing of new shares and the subsequent transfer of such shares without reservation to the plaintiff in error entitled him as such stockholder under the provision of the National Bank Act governing the transfer of stock to his share in said assets.

The Supreme Court of Errors in its judgment on which this writ of error was issued, reversed the decision of the Superior Court and held that under the aforesaid laws of the United States, the persons who were stockholders when the capital was reduced were entitled to such assets, and thus denied the rights claimed by the plaintiff in error.

This decision presents a question within the jurisdiction of and reviewable by the Supreme Court of the United States on writ of error under

U. S. Statutes, Sec. 709.

"When the highest Court of a State by any form of decision affirms or denies the validity of the judgment of an inferior court over which it by law can exercise appellate jurisdiction, the jurisdiction of this Court to review such decision if it involves a Federal question, will upon a proper proceeding attach."

Williams vs. Bruffy, 102 U. S., 248.

The rights and privileges claimed by the plaintiff in error were all made under and depended upon his stock certificates issued by a National corporation under the laws of the United States and all his rights were governed and controlled by the laws of the United States and these rights were not only claimed as shown by the claim (page 17), the memorandum of decision (pages 18-20), opinion of Supreme Court (pages 54-7), but they were necessarily involved in the question before the Court, and determined by its decision.

"If from the questions it appears that some title, right, privilege or immunity on which recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States within the meaning of that term as used in the Act of 1875; otherwise not."

Starin vs. New York, 115 U. S., 248.

"Jurisdiction may be maintained when a definite issue as to the possession of the right is distinctly deducible from the record and necessarily disposed of."

Mutual Life Ins. Co. vs. McGrew, 188 U. S., 309.

"It is not necessary to state in terms on the record that the Constitution or a law of the United States was drawn in question. It is sufficient to bring the cause within the provisions of the twenty-fifth Section of the Judicial Act, if the record shows that the Constitution or a law or a treaty of the United

States must have been misconstrued or the decision could not be made."

Wilson vs. Marsh, 2 Pet., 245.
Crowell vs. Randall, 10 Pet., 368.
Furman vs. Nichol, 8 Wall., 56
William vs. Hurd, 140 U. S., 529.
Forks National Bank vs. Anderson, 172 U. S., 573.
McCormick vs. Market National Bank, 165 U. S., 538.
Waite vs. Dowley, 94 U. S., 532.
Kaukauna vs. Green Bay, 142 U. S., 269.
Logan Co. Bank vs. Townsend, 139 U. S., 67.
Swope vs. Leffingwell, 105 U. S., 3.
California Bank vs. Kennedy, 167 U. S., 366.
Green Bay, &c., vs. Patten Paper Co., 172 U. S., 58.
Yazoo, &c., R. Co. vs. Adams, 180 U. S., 15.
Home for Incurables vs. New York, 187 U. S., 155.

THE DETERMINATION OF RIGHTS OF STOCKHOLDERS TO A DISTRIBUTION OF THE ASSETS DEPENDS UPON THE EFFECT OF THE REDUCTION OF CAPITAL, THE APPROVAL OF THE COMPTROLLER AND THE VOTE OF THE DIRECTORS IN RELATION TO THE CHARGED OFF ASSETS.

THE CAPITAL OF THE BANK WAS REDUCED FROM $300,000 TO $200,000. (SEE VOTE, RECORD, P. 33.)

COMPTROLLER MUST APPROVE REDUCTION OF CAPITAL.

It is provided by Sec. 5143, Revised Statutes of U. S.,

"Nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained."

The Comptroller is simply an executive officer charged with the duty of administering the National Bank Act, and he has no power to add to or take away from these laws.

U. S. Revised Statutes, Sec. 324.

He cannot increase or reduce the capital of the bank and he has no power to require shareholders to withdraw any part of the capital invested in the banking business; his approval either of an increase or a reduction of capital extends only to the conditions imposed by the National Bank Act upon the right of the shareholders either to increase or reduce the capital.

COMPTROLLER'S OFFICIAL CERTIFICATE OF APPROVAL UNCONDITIONAL.

This is shown by the certificate itself (Exhibit "K," Record, p. 35), and it will be noted that the certificate was dated and mailed from Washington on June 9th, while the statement itself of the directors was dated and mailed at Norwich on the same day, and did not reach Washington until later, as shown by the Comptroller's letter (Exhibit "L," p. 35), and the actual vote of the directors attempting to set apart these assets was not made until June 27th (Exhibit "M," p. 35).

All conversations and letters prior to June 9th became merged in the official certificate of approval executed and issued on that date.

This official certificate is conclusive and cannot be attacked, changed or added to collaterally, as would appear by analogy from

Bailey vs. Tillinghast, 99 Fed. R., 808, and cases cited.

But the Court, aside from the certificate, finds as a fact that the only condition actually imposed was in the letter of May 15th in the words,

"PROVIDED SO MUCH OF THE AMOUNT AS IS NECESSARY IS USED TO CHARGE OFF BAD, DOUBT-

FUL AND UNPRODUCTIVE ASSETS, THE DIFFERENCE ONLY BEING PAID TO THE SHAREHOLDERS IN CASH."

The reference in the letter of May 19th to the rights of the shareholders, either to the cash or charged off assets, is not a condition imposed or intended to be imposed upon the right to reduce the capital, but is merely a statement of the Comptroller's opinion of the law governing the rights of stockholders after the reduction had taken place. He says in one sentence that the consent of the shareholders must be obtained for the withholding from him of any money to which he may be entitled by reason of the reduction, only in case the whole amount of the reduction is not required to charge off bad, doubtful and unproductive assets.

The law determines the rights of the shareholder, and the Comptroller could not change such rights. He did not impose, as a condition precedent to the reduction, that the cash or property should be either held or returned.

The Superior Court conclusively determined the facts in its finding (Record, pp. 22-29) and found as a fact that the Comptroller's letter of May 15, Exhibit "F," 32, embodied the condition on which the reduction would be approved.

The Supreme Court of Errors has no jurisdiction to determine facts, and will review facts only where a conclusion of fact is drawn from other detailed facts, and this Court can review the same question.

The conclusion of the Superior Court was correct on this point: The letter of May 15 was written in relation to the stockholders' meeting about to be held which actually voted the reduction. All prior correspondence was in relation to the meeting and vote which failed for lack of the necessary votes. THE REQUIREMENT AND PURPOSE OF THE COMPTROLLER SHOWN BY ALL HIS LETTERS (PP. 31, 32, 34), WERE THAT REDUCED CAPITAL BE USED TO CHARGE OFF BAD DEBTS SO FAR AS NEC-

ESSARY AND THE EXCESS ONLY PAID IN CASH TO THE STOCKHOLDERS.

He was seeking to prevent any payment of cash to stockholders until all bad debts had been charged off, and not seeking to compel the payment of cash to stockholders; they could look out for themselves in respect to that as the law would protect them.

CAPITAL REDUCED TO MEET IMPAIRMENT OF CAPITAL AND NOT TO SET FREE CAPITAL.

The Court has found as a fact that the reduction of capital was made to meet the diminution of the assets of the bank, caused by charging off the assets described in said schedule which were bad and doubtful assets within the meaning of Sec. 5204, U. S. Revised Statutes, and as the Court has found that it had a surplus at that time of from forty to fifty thousand dollars, if these bad debts had all been charged up, its capital would have been impaired from fifty to sixty thousand dollars, and out of that apparent surplus losses were afterwards deducted of from twelve to fifteen thousand dollars. (Record, p. 24, Sec. 18; p. 47, Sec. 17).

The Court has also found that the intent and purpose of the reduction was to charge off the amount of bad and doubtful debts in the schedule and cover any impairment of capital and still leave the bank with a fair surplus. (Record, p. 24, Sec. 17; p. 29, ruling 3).

The bank needed a surplus, for without it, any new loss would have impaired its capital, and until it had a surplus fund equal to twenty per cent. of its capital stock, it would be required to carry one-tenth part of its net profits to its surplus fund under the provisions of Sec. 5199, U. S. Revised Statutes.

See letter, p. 30, line 10. Vote, p. 31, line 20. Letter, p. 32, line 13. Letters, p. 34. Vote, p. 35.

PLAN OF REDUCTION WAS TO USE ENTIRE AMOUNT TO CHARGE OFF BAD ASSETS AND LEAVE BANK WITH A SURPLUS.

The condition imposed by the Comptroller required all of the reduction, if necessary, to be used to charge off bad assets, and it must be assumed that the Comptroller knew of the bank's statement and condition, and his approval of the reduction upon condition that it all be used to charge off bad debts, which precluded the use of the surplus for that purpose, must be assumed to have included the plan of leaving the bank with the surplus which its statement showed.

CONDITION OF BANK AT TIME OF REDUCTION.

Leaving out of consideration the general liabilities of the bank because it had sufficient cash and assets to meet its liabilities, we take up only its capital stock account.

Its capital stock of $300,000. before the reduction, constituted a liability to stockholders in that amount and to meet that it had, not cash, but sundry items of personal property carried on its books at from $340,000. to $350.000.

But it had already suffered losses on one hundred thousand dollars' worth of these items, which were bad debts under the National Bank Act, Sec. 5204, and had to be charged off, and that would impair its capital from fifty to sixty thousand dollars, provided all of its surplus was used in charging off, and then either an assessment must be made or a reduction of capital.

The bank decided to reduce its capital $100,000. on account of the $100,000. of bad assets (See Exhibit "D," p. 31, and Exhibit "M," p. 35), and the Comptroller imposed the condition that the entire amount, if needed, be used to charge off bad assets. It was all needed and was all so used (Record, p. 24, par. 15), and the Comptroller necessarily approved the retention of the surplus which the bank's statement showed after the reduction.

The reduction relieved the bank of a liability to stockholders

for $100,000. and enabled it to charge to profit and loss $100,000. of losses which had taken place before that time, but which now appear for the first time on its books by the reduction to that amount in the book value of sundry assets.

NO RELATION OR IDENTITY, EITHER IN FACT OR LAW, BETWEEN THE REDUCTION AND ANY SPECIFIC PROPERTY OF THE BANK.

The purpose of the National Bank Act, to be effected through the supervision of the Comptroller, is that the capital of a bank shall not exceed, but must be kept in line with the actual value of the assets. If the value of the assets falls off, it can be accomplished either by an assessment, thus increasing the value of the assets, or by a reduction of the capital, thus decreasing liabilities.

In both cases the title to all the assets of the bank is undisturbed and remains in the bank.

In the case of a reduction of capital made necessary by a depreciation in the value of its assets, the reduction is caused by the general depreciation or falling off of the total value of all the assets, but all the assets whether finally carried at some or no valuation, still belong to the bank and represent its capital, and it is the loss or depreciation alone that represents the reduction in capital stock liability and is charged off to meet it.

In this case several of the so-called charged off assets were not treated as a total loss, but were still carried after the reduction at a valuation which went to make up the new capital, but the principle and effect are the same, whether the entire face value or three-fourths face value is treated as a loss, for it is the loss in value and not the specific asset which represents and offsets the reduction.

This is illustrated by assuming a case where the loss on every one of the assets is only a part of its face value and every asset at a less valuation is still carried on the books and goes to make up the new capital. It is clear that the reduction in such a case

would not effect a change in the title to the assets, but that the specific assets would still belong to the bank and be subject to disposition by it.

NO LIEN OR CHARGE IN LAW OR EQUITY IN SUCH A CASE AGAINST THE ASSETS, AND IF SO, NO POWER IN THE DIRECTORS TO CREATE ONE.

REDUCTION OF CAPITAL STOCK TO SET FREE UNEMPLOYED CAPITAL WOULD NOT VEST TITLE IN STOCKHOLDERS TO ANY SPECIFIC ASSETS.

If the capital stock, instead of having been reduced to meet losses, had been reduced for the express purpose of setting free unemployed capital to the extent of $100,000., such reduction would not have vested title to any specific assets in the shareholders, nor would the directors have had any power to set apart any specific assets, or allow the shareholders to take, or compel them to take, any specific assets, as representing said reduction but the shareholders would still have held their interest, as such in all of the assets of the bank and would have had a right of action simply against the bank to compel the payment of the amount of the reduction.

If such a reduction to set free capital, does vest title, equitable or otherwise in specific assets of the bank, what assets are they and who is to designate them? The directors could set apart such assets as they saw fit, and compel the stockholders to accept them, if such is the case.

The shareholders in this case all surrendered their stock and took new certificates and made no claim to the return of any capital set free and waived any such claim, and consented to the bank's retaining the capital including the surplus. The delay in making any such claim and the changes in the property and affairs of the bank which have occurred in the meantime, are a bar to any such claim by shareholders now.

The case of Seeley vs. Bank, 8 Daly, 400, is entirely different

from this case, but illustrates the principle that when reduction is made to *release unemployed assets*, the right of the stockholder is not to any specific assets, but simply his general equitable right to be paid or have returned to him in money the proportionate share, represented by his stock, of the reduced capital. In that case, the bank reduced its capital two-fifths or $200,000. and stockholders voted to return $100,000. to stockholders and carry $100,000. to surplus. That is, the bank had a surplus entirely apart from reduction and actually had $100,000. to carry to the surplus on reduction which is not the case here. Seeley refused to surrender his certificate on these terms, but offered to surrender it, and demanded a new certificate for three-fifths and cash for two-fifths of the amount of his shares, and in an action for equitable relief, his contention was sustained.

In the case at bar, no cash was set apart and none carried to surplus, and the entire $100,000. was treated as of no value at that time, and there is no evidence that at that time it had any value, or if so, what it was. Entirely apart from this transaction the bank had a surplus at this time and before this time, and this surplus had been created according to law by carrying one-tenth of the net profits to that account, and it was a surplus *created from earning* and not from reduced capital which distinguishes this case in principle from the Seeley case. While the Court has found this surplus existed on an actual, and not a book value of the assets, no issue was made on that point on the claims as they existed in the case at the time, and it appears some of the assets on which the surplus depended, had later to be charged off to the extent of $12,000. to $15,000. (Record, p. 24, Sec. 18).

To hold that the bank could not reduce $100,000. to charge off bad assets of $100,000., when it already had a surplus outside of that, is simply to hold the reduction bad, and it was conceded by the parties that the reduction was valid. It was intended to make the reduction and use it in that way and leave the surplus intact and the Comptroller approved it on those terms. To have stripped the bank of all of that surplus would

have left it in bad condition and with its capital soon to be impaired again. It cannot be determined now whether any or how much of the surplus might have been spared and used for either charging off bad assets or returning capital to stockholders, and that was a question for the bank and the Comptroller to decide at that time.

ASSUMING THAT AN EQUITABLE TITLE VESTED IN THE STOCKHOLDERS TO THE ASSETS ACTUALLY CHARGED OFF, IT IS APPARENT THEY ARE NOT ENTITLED IN EQUITY TO THE ASSETS NOT FULLY CHARGED OFF, BUT CARRIED IN AND NECESSARY TO MAKE UP NEW CAPITAL.

The finding (p. 25, Sec. 21), shows that the asset in bond account Am. Linseed Oil Co. had a face value $6,125., of which $5,125. was charged off as a loss and the bonds themselves were still carried at $1,000. in the live assets to make the new capital, and the item F. P. Geer note had a face value $10,470.04, of which $8,470.04 was charged off as a loss and the note itself still carried at $2,000. as a live asset to make the new capital.

The demand loan E. A. Packer, $15,647.50., was charged off, but the bank held Wisconsin R. Co. stock as collateral and under the head of Note C. P. Cogswell, Tr., $1,187.50., discounted by it to pay an assessment on this stock, still carried it as a live asset and finally realized on this collateral $11,985.26 (p. 42, Sec. 23½).

This, which constitutes about one-half the entire amount realized from charged off assets, should surely remain in the capital of the bank and go to the present stockholders.

This point is well illustrated by assuming that to offset a capital of $300,000. the bank owned 300 $1.000. bonds which had fallen off in value one-third. If the bank reduced its capital $100,000. to meet the loss, the bonds would still belong to the bank, and if their value was subsequently increased or restored, no part of them would belong to the old stockholders nor would such stockholders have any lien or charge upon them.

IT MUST BE NOTED THAT THE OLD STOCKHOLDERS HAVE NOT PRESENTED, AND DO NOT MAKE ANY CLAIM UPON THE GENERAL ASSETS FOR A SHARE OF ANY CAPITAL SET FREE BY THE REDUCTION, BUT HAVE SIMPLY CLAIMED THE RIGHT TO OWNERSHIP OF THE SPECIFIC ASSETS ON WHICH THE LOSSES OCCURRED CAUSING THE REDUCTION AND WHICH WERE CHARGED OFF TO MEET IT.

If they had the right to a return of cash from the general assets, then the directors had no power to turn over to them assets of no value.

It is true they might waive their right and accept them, but in this case they did not, as nothing has ever been delivered or paid to them, and the record does not disclose that the stockholders ever had any knowledge of the vote.

THE STOCKHOLDERS TOOK NO ACTION AS TO THE DISPOSITION OF THE CHARGED OFF ASSETS.

See Exhibit "D," 31, Exhibit "H," 33. At stockholders' meeting, April 3d, a list of items was presented, amounting to $101,317.86 to be charged off, showing that the stockholders knew that the reduction was all to be used for that purpose.

The directors after the reduction passed a vote (p. 35, Exhibit "M.")

"That the assets of this bank contained in the accompanying schedule, which assets are considered either bad or doubtful and on account of which the capital stock of this bank has been reduced from $300,000. to $200,000. be set aside from the other assets of the bank and be held by it in trust for the stockholders of record on the 9th day of June, 1900, and that whatever may be realized from said assets be distributed from time to time as may be reasonable among said stockholders in proportion to their respective holdings on said date."

There was no capital set free or cash to pay to stockholders

and this was but a promise to pay something to be realized in the future and was binding the bank to go to the expense of holding and managing the property.

THE DIRECTORS HAD NO POWER TO SET APART ANY SPECIFIC ASSETS FOR THE STOCKHOLDERS OF RECORD.

The directors of a national bank have no power to reduce its capital, or to make an assessment, but the stockholders alone have such power.

U. S. Rev. Stat., Sec. 5143.

Commercial National Bank v. Weinhard, 192 U. S. 249.

The powers and duties of Directors are defined and limited in U. S. Rev. Stat., Secs. 5136 and 5145.

The stockholders alone have the power to determine the amount of capital stock to be used in the banking business and to increase or reduce the amount of that capital.

U. S. Rev. Stat., Secs. 5134, 5142, 5143.

It is the duty of the Directors to use the capital of the bank in managing its affairs to further the object for which the bank was created, and it necessarily follows that the Directors have no power to decide not to use capital for the purpose determined by the stockholders, but to return it to them.

The property and assets in specie of a National Bank represent its capital without regard to any value fixed upon them by estimate or appraisal, and when the capital is reduced, the specific assets are still capital and represent the capital as reduced, and any amount of estimated or appraised value set upon the assets in excess of the capital is still capital, which it is the duty of the directors to keep employed in the business of the bank.

The reduction in the present case was made to meet an im-

pairment of capital caused by losses; the losses were charged off; the specific property or choses in action, on which the losses occurred, still remain the property of the bank and assets, even though by an appraisal they are estimated or valued at nothing. Several of these specific items of property still had an estimated value and went to make up the reduced capital of the bank at such valuation and it was the estimated loss alone that was charged off.

We contend that all these assets still constituted the capital of the bank after the reduction; they must be either capital or earnings, and they surely are not earnings.

As the capital was reduced solely to meet an impairment caused by losses, there was no capital left unemployed and released, to be returned to the stockholders.

All the specific property and assets of the bank after the reduction represented and made up the capital stock as reduced and neither the stockholders nor the directors had any power to take any of this specific property from the bank and restore it to the stockholders whether by an appraisal it was valued at something or nothing, for the capital was reduced solely to meet an impairment and there was no unemployed capital left.

U. S. Rev. Stat., Sec. 5204.

In McCann vs. First National Bank, of Jeffersonville, 112 Ind., 358, the Court after stating that a bank might reduce on account of unemployed capital and that in such a case the excess could not be carried to surplus and be diverted from the stockholders without their consent, say, "The appellant surrendered his proportion necessary, as a consideration, immunity from impending assessment and the privilege of holding the residue in a continuing association. Delano vs. Butler, 118 U. S., 634.

"Having received the whole consideration upon which the surrender was made, the stockholder could not receive more simply because the bank succeeded in realizing upon the notes and bills which caused suspension. Corporations have no implied power to enlarge or diminish their capital or distribute among the

shareholders any part of the fund which constitutes the capital stock, prior to the winding up. Sutherland vs. Alcott, 95 N. Y., 93.

"Persons who invest in banks, must look to Acts of Congress for authority to demand the return of any part of the capital, or gains in shape of dividends.

"Section 5143 * * required the bank to obtain the approval of the Comptroller to the proposed reduction and the proceedings for diminishing the capital ended with the approval obtained.

"The capital as reduced and the assets then held, constituted a trust fund upon the faith of which it was authorized to proceed with business.

"The directors had no authority thereafter to permit the capital or assets to be further depleted by distribution in one way or the other, of bills and notes among stockholders. In re Ex. Bank Co., L. R. 21 Chan. Div., 519.

"The bank could only distribute surplus in money when it accumulated it in the course of its business and the right to distribute would depend on an examination at the time. Strong v. Brooklyn C. R. Co., 93 N. Y., 426."

In McCann, Trustee, v. First Nat. Bank, of Jeffersonville, 131 Ind., 95, the Court say, "Conceding without deciding that the stockholders of a bank, the stock of which is intact, may voluntarily reduce the capital under the statute and withdraw an equal amount of assets, the question remains, can they take such action when the reduction is involuntary and only made to an amount equalling the impairment of assets.

"The right to withdraw in one case, would not involve it in the other.

"In the latter case the reduction is made because the amount of investment is lost and already involuntarily withdrawn. * *

"The stockholders had no power to withdraw the assets and no valid trust was created."

The authority of these cases is supported and has been taken as the foundation for the text by the following text-writers.

1 Cook on Corporations (5th Ed.), Sec. 289.

2 Thompson, Com. on Corporations, Sec. 2119.

A stockholder has no title to any portion of the property of the corporation. His rights as shareholder are merely contract rights and his certificate is merely a symbol of an incorporeal right which he posseses to a proportionate share in the capital stock and net earnings.

The corporation stands in the nature of a trustee as to the corporate property, to apply it first, to pay debts, and, second, upon a winding up to restore to the shareholder his proportionate share of the proceeds.

2 Morawetz on Priv. Corp., Secs. 224, 226.

Jermain v. Lakeshore, 91 N. Y., 483 (491.)

Money distributed by a corporation upon winding up its affairs is capital and not earnings.

Gifford v. Thompson, 115 Mass., 478.

The vote of the directors was not the declaration of a dividend.

The power of the directors of a National Bank to make dividends is limited by the provisions of the United States Statutes and dividends can be made only from net profits.

"Sec. 5199. DIVIDENDS.

"The directors of any association may, semi-annually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half-year to its surplus fund until the same shall amount to twenty per centum of its capital stock."

"Sec. 5204. PROHIBITION UPON WITHDRAWAL OF CAPITAL.

"No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to

be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any association, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in the process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three."

These so-called charged-off assets were not net profits.

The directors had no power to create any different trust in any part of the capital of the bank than that which the law creates, namely, that upon a winding up of its affairs after the payment of all debts, the net proceeds of the corporate property are held in trust for the shareholders in the bank.

Even though it were to be held that title to these assets vested in the stockholders, and the directors could have delivered them to the stockholders, they surely had no power to bind the bank to hold and administer them in trust, and go to a large expense in doing so.

SHAREHOLDERS AT REDUCTION BY TRANSFERRING THEIR SHARES TRANSFERRED ALL THEIR RIGHTS IN CAPITAL.

The present claimants are all present shareholders in the bank, and the other claimants, who were shareholders at the time of the reduction of capital, have sold and transferred their shares, without any exception or reservation of rights, and ceased to be shareholders.

The nature of the interest of a shareholder has already been considered and the transfer and the effect of a transfer by the

shareholder of his shares is provided for and governed by the National Bank Act.

"Sec. 5139. SHARES OF STOCK AND TRANSFERS.

"The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

Under this law the shareholders at the time of the reduction by transferring their shares, parted with every interest in the capital stock of the bank and the present shareholders have succeeded "to all the rights and liabilities of the prior holder."

INTEREST OF SHAREHOLDERS.

Present stockholders:—

F. S. Jerome, et al., claimants, represent	1102 Shares.
C. P. Cogswell represents	519 Shares.
State Bank represents	66 Shares.
	1687
Not represented,	213

All the other defendants are not present shareholders, and C. P. Cogswell has secured assignments of the rights in 1472 shares of the old stock, the new stock itself having been transferred, and much of it now represented by the appellees.

Old stockholders represented:—

~~F. S. Jerome, et~~ al.,	638 Shares.
C. P. Cogswell secured assignment of rights in	1472 Shares.
	2110

By comparison with the original complaint, it will be seen that Cogswell has secured the rights in 996 of the 1472 shares since these proceedings were instituted, and all of them since the shareholders had surrendered their old shares without reservation and transferred the new shares which they received for the old ones.

DECISION ON DEMURRER IN COGSWELL VS. SECOND NATIONAL BANK, 76 CONN., 252, NOT DECISIVE OF THIS CASE.

The decision of the Supreme Court of Errors on the demurrer to the complaint in the original action referred to in the opinion has no bearing in this case for the reason that the complaint alleged that the bank set apart the assets and it did not appear that the reduction was solely to meet an impairment of capital and the facts as to the details of the action by the stockholders and the approval of the Comptroller and the details as to the nature and condition of the specific property, did not appear, so that the question could not be fully made on demurrer to the original complaint, and that case was between different parties, and could bind the stockholders as to the distribution of the capital.

Respectfully submitted,

DONALD G. PERKINS,

WILLIAM H. SHIELDS,

Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 80.

Office Supreme Court, U
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JAMES H. McKENNE
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FRANKLIN S. JEROME,
Plaintiff in Error,

vs.

CHARLES P. COGSWELL, THE STATE SAVINGS BANK, ET AL.

IN ERROR TO THE SUPREME COURT OF ERRORS OF CONNECTICUT.

BRIEF OF DEFENDANTS.

HADLAI A. HULL, } *of*
FRANK T. BROWN, } *Counsel.*

BULLETIN PRINT, NORWICH, CONN.

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STATEMENT.

Prior to the reduction of its capital stock, The Second National Bank of Norwich was, and for many years had been, a banking association, organized under the Act of Congress with capital stock amounting to $300,000, and located in the Town of Norwich, in the State of Connecticut.

In the latter part of 1899 the officers of the bank, having in contemplation a reduction of the capital stock, communicated with the Comptroller of the Currency, and the bank received from him a letter, dated December 4th, 1899, which is made a part of the finding as Exhibit "A." (Record, page 29.)

The next step in the proceedings was a vote of the directors, instructing the Cashier to prepare and submit to the next meeting of the Board a notice and circular to be sent to the stockholders recommending the reduction of the capital from $300,000 to $200,000. (Record, page 30.)

On March 9th, 1900, the Comptroller wrote to the Cashier of the bank acknowledging receipt of this letter of March 8th, and copy of notice of stockholders' meeting called to consider the matter of reduction, and advising him that in case the reduction was made it would be necessary to obtain the consent of each shareholder to the retention of any money not necessary for retiring bad and doubtful assets of the bank. (Record, page 30.)

A meeting of the stockholders was held on April 3rd, 1900, and the proposition to reduce the capital stock failed to receive the necessary vote. (Record, page 31.)

On May 9th, 1900, the directors again voted to call a meeting of the stockholders to consider the question of reduction. (Record, page 31.)

On May 15th, 1900, the Comptroller of the Currency wrote the Cashier of the bank acknowledging his letter of May 9th in reference to the reduction of the stock from $300,000 to $200,000, and informing him that the reduction would be approved provided so much of the amount as might be necessary should be used to charge off bad, doubtful and unproductive assets, the difference only being paid to the shareholders in cash. (Record, page 32.)

On May 19th the Comptroller wrote to the President of the bank acknowledging receipt of his letter of May 18th, and copy of notice of stockholders' meeting to be held on the 24th for the purpose of considering a reduction of the capital stock, and advising the President that he would approve of the reduction upon the condition that so much only of the capital set free as should be necessary to charge off bad, doubtful and unproductive assets should be used for that purpose, and that if the whole amount of the reduction in capital was not required for that purpose, the consent of each shareholder must be obtained to the withholding from him of any money to which he might be entitled by reason of the reduction, and that the shareholders of a national bank, upon a reduction of its capital stock, are entitled to either receive the cash or the charged off assets, and that neither can be withheld without their consent, and that the Comptroller's office did not approve of the recommendation of the directors that the assets of the bank should remain the same, the number of shares simply being reduced. (Record, page 32.)

The Comptroller also had an interview with the President of the bank in reference to the reduction of the capital stock and said to him that he must remember that the assets belong to the stockholders of record and a trust fund must be created so that

those assets might be distributed among the stockholders of record at the time of the reduction. (Record, page 23.)

On May 24th, 1900, a meeting of the stockholders was held at which the proposition to reduce the capital stock of the bank from $300,000 to $200,000 received the vote required by law. (Record, page 33.)

On June 9th, 1900, the directors of the bank notified the Comptroller in writing that the amount of the reduction of the capital stock, namely $100,000, would be used for the purpose of charging off bad, doubtful and unproductive assets, and that no money would be paid to the shareholders unless realized from said assets, which were to be set aside and collected for the benefit of the shareholders of record at date of issuance of the Comptroller's certificate approving the reduction, and requesting that the Comptroller issue a certificate of approval of the reduction of the capital stock. (Record, page 34.)

And on June 9th the Comptroller, in a written communication to the President of the bank, stated that he enclosed in the communication his certificate approving the reduction of the capital stock, and that the certificate is issued in view of the statement filed with the Comptroller on said day to the effect that the whole amount of the reduction would be used to charge off bad, doubtful and unproductive assets, and no money would be paid to the shareholders unless realized from said assets. (Record, page 34.)

On June 27th the directors voted that the assets which are in dispute in this case, and on account of which the reduction of the capital stock was made, be set aside from the other assets of the bank, and be held by it in trust for the stockholders of record on June 9th, 1900 (which was the date of the Comptroller's certificate of approval), and that whatever might be realized from said assets be distributed from time to time, as might be reasonable, among said stockholders in proportion to their respective holdings on said date. (Record, page 35.)

Annexed to the vote was an itemized statement of the assets, a part of which consisted of real estate standing in the name of the bank, and the balance choses in action. As a matter of book-keeping and to make out a balance-sheet, the capital stock of the bank was credited with the reduction of $100,000, and profit and loss was charged to the amount of $100,307.86, being the face value of the assets incorporated in the vote of the directors of June 27th.

From June 27th, 1900, the bank treated these assets as the property of the stockholders of record June 9th, 1900. The net amount of whatever was received from them was carried as a distinct item in the books of Daily Balance Credit as a credit to "Stock-trust," and a ledger account was opened with "Stock-holders' Trust," and all receipts were credited to that account and all expenses incurred in realizing on the assets were charged up to it, and so far as the books of the bank were concerned, these assets were always treated as a special fund belonging to the stockholders of record June 9th, 1900. (Record, pages 24 *et seq.*, also page 55.)

From the sale of the real estate and collections of the choses in action the receiver now has in his hands, after deducting all expenses, $20,240.00, and has also some of the assets in specie of the value of about $2,000. (Record, pages 25, 55.)

At the time of the reduction of the capital stock the net actual capital of the bank applicable to stock was, exclusive of the assets in question, of the actual value of between $240,000 and $250,000, that is to say, excluding the assets in question the bank had, after reducing the stock to $200,000, a surplus of between $40,000 and $50,000. (Record, pages 47, 55.)

All of the defendants except the receiver were on June 9th, 1900, and had been for a long time prior thereto, stockholders of record of said bank to the extent shown in the finding, and the defendant, Cogswell, has since become the owner of additional

shares, and also of the rights in these assets of sundry parties who were stockholders of record on June 9th, 1900. (Record, pages 24, 25.)

After July 1st, 1900, the stockholders surrendered their certificates and received certificates for two-thirds of their former holdings. Most of the defendants have sold and transferred their shares, but none of them have sold or disposed of any rights in the assets in question, unless the mere transfer of their shares without expressly reserving their rights carried with it such rights as a matter of law. (Record, page 26.)

The assets in question were separated from the other property of the bank and set aside as the property of the stockholders of record at the date of the reduction of the capital stock in compliance with a promise made by the president and directors of the bank to the Comptroller, without which promise his approval of the reduction of the capital stock could not have been obtained. (Record, page 56.)

There is no finding in respect to the ownership of stock by the plaintiff, Jerome, except that he was a stockholder on the 24th day of February, 1903, the date of the expiration of the bank's charter.

After the expiration of the charter the present action was brought by a shareholder and a receiver appointed who has in his possession the disputed assets.

The Supreme Court of Errors of Connecticut decided that the fund in dispute belongs to the shareholders of record at the date of the reduction of the bank's capital stock, viz., June 9, 1900.

That the interests of the plaintiff, Jerome, were in any way affected by the decision is not apparent from the record because the only finding as to his ownership of stock is that he owned certain shares at the date of the expiration of the bank's charter

viz., February 24, 1903. It does not appear when he acquired them, or whether it was before or after June 9, 1900.

The general statement of the plaintiff's complaint contained in his assignment of errors is that the Connecticut Court erred in adjudging that he was not entitled as a shareholder of the bank to his proportionate share of the assets in dispute, and that thereby he was deprived of a right and privilege to which he was entitled under certain enumerated sections of the statutes of the United States. (Record, page 58).

The special assignments are in substance that the court attributed to the Comptroller of the currency under section 5143 an authority which he did not possess; that it put a wrong restriction on the effect of his certificate of approval and the condition upon which it was given; that it assumed a power on the part of the directors under the banking act to appropriate the fund in dispute to the benefit of shareholders of record at the date of the reduction of the capital stock, and to separate it for that purpose from the property of the bank, when they possesed no such power; that it held improperly that the assets in questions were under the circumstances the equivalent of net profits within the meaning of sections 5199, 5204 of the National Banking Act, and that the action of the directors could be sustained as a dividend under those sections; and that the plaintiff was thereby deprived of a right to a proportionate share of the fund under section 5139 as a transferee of shares of stock. *Ibid.*

It nowhere appears in the record that the plaintiff claimed any such right in the state court unless it is inferred from the language of the opinion. (Record, pages 54-57.)

If it is assumed that he did, his real complaint is that the state court by erroneously attributing to the Comptroller and the bank directors an authority under the National Banking Act which they did not possess, deprived him of a right which belongs to him *not under any statute of the United States* but under *a rule of*

law applicable to corporations generally, unless indeed he can establish his right under section 5139.

If his interests were affected by the decision we submit the following

REASONS WHY THE WRIT SHOULD BE DISMISSED OR THE JUDGMENT OF THE STATE COURT AFFIRMED.

FIRST.

The state court denied to the plaintiff no right to which he was entitled under any of the sections of the National Banking Act enumerated in his assignments of error. The purpose of sections 5199 and 5204 is to keep the capital of a bank intact and to provide for the accumulation, under certain conditions, of a twenty per cent. surplus. The appropriation of the fund in dispute to the stockholders owning shares on June 9, 1900, left the capital of the bank intact and a surplus of more than twenty per cent., (although on a reduction of the stock it does not seem to us that this was necessary or could have been done lawfully if contested by the shareholders,) and the state court might properly treat the act of the bank directors as a division of what was equivalent to net profits.

Section 5204 seems to contemplate such a distribution of assets because it provides that, "Nothing in this section shall prevent the reduction of the capital stock of the association under section 5143."

Section 5139 provides that "Every person becoming such shareholder by such transfer shall in proportion to his shares succeed to all the rights and liabilities of the prior holder of such shares." It does not attempt to define what the rights are, but leaves them to be determined by general rules of law. There is no finding that the plaintiff held any shares *by transfer,* and if he did the state court has denied him no right under the statute, but

has decided, in accordance with general rules of law, that after the trust fund was created no interest in it attached to the shares of stock, or went with them on a transfer any more than would a cash dividend declared before a transfer. This presents no federal question.

Eustis, et al., v. Bolles, et al., 150 U. S. 361.
Leyson v. Davis, et al, 117 U. S. 36.
Baker v. Baldwin, 187 U. S. 75.
Mutual Life Ins. Co. v. McGrew, 188 U. S., 291.
Beals v. Cone, et al., 188 U. S., 435.

The state court committed no error in deciding that the Comptroller of the Currency had the right under section 5143 to protect the legitimate interests of the shareholders when he gave his approval of the reduction of the capital stock. The right is fairly implied from the powers given to him by the Statute, the protection was reasonable, and the method adopted was proper for the reasons hereinafter given, but whether the Court was right or not, the decision denied no right of the plaintiff under the statute because he claimed none. He claims simply that the construction given to the statute deprived him of rights to which he was entitled by general rules of law.

The board of directors was the proper body to separate the assets in question from the other assets of the bank and divide them among the stockholders under section 5145 for the reasons given later, but if it were otherwise the plaintiff claims for himself no right to the assets under that section. The other sections of the statute mentioned were not drawn in question in the case. If the record presents any federal question, and we claim it does not, no decision upon it by the state court deprives the plaintiff of any right under a statute of the United States.

SECOND.

If the action of the bank's directors was not a dividend of what was equivalent to net profits, its validity can be supported on other grounds, and we submit for the court's consideration the following

GENERAL PROPOSITIONS OF LAW.

1. When the assets of a national bank become so reduced in value that the net actual capital of the bank applicable to capital stock is insufficient to make it worth its par value, and a reduction of its capital stock is made, simply sufficient to make the reduced capital stock worth par, there can be no distribution of assets.

2. When the capital stock of a national bank is reduced and there is no impairment of its capital, there must be a distribution of assets among the stockholders of record at the date of the reduction.

3. When the net actual capital of a national bank applicable to capital stock is insufficient to make the stock worth par and a reduction of capital stock is made, but to an extent greater than is necessary to meet the impairment, so much of the net actual capital as is not necessary to make the reduced stock worth par, should be distributed among the stockholders of record at the date of the reduction.

4. It is within the authority of the Comptroller of the Currency to condition his approval of the reduction of capital stock on the adoption of such measures as he may think proper to do justice to the holders of the original shares.

5. The right of the stockholders to a distribution, as stated in (2 and 3), is not, however, dependent upon any action of the Comptroller, but belongs to them under the law independently of any action on the Comptroller's part.

POINT I.

There was no controversy in the State Court over the first proposition. It is supported by the authority of McCann v. First National Bank of Jeffersonville, 112, Ind. 354, McCann, Trustee v. First National Bank of Jeffersonville, 131 Ind. 96, 97, and we refer to it only because the reasoning of the Indiana Court by implication supports our second proposition.

POINT II.

The National Banking Act provides for the reduction of the capital stock of a bank as follows: "Section 5143. Any association formed under this title may by the vote of shareholders holding two-thirds of its capital stock reduce its capital to any sum not below the amount required by this title to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained."

We have found only two cases in which the disposition of assets of a national bank upon the reduction of its capital stock, under this provision, has been considered and passed upon They are the Indiana case, cited above, and Seeley v. The New York National Ex. Bank, 8 Daley, 400 (affirmed 78 N. Y., 608.) We see no conflict between these cases. The Indiana Court decided that where the reduction was required to meet an actual impairment of capital and to prevent an assessment upon the stockholders threatened by the Comptroller of the Currency, there could be no distribution of assets because all the assets were necessary to make the reduced stock worth par and any withdrawal of assets would produce a new impairment of capital and defeat the purpose of a reduction.

"It must be remembered that the reduction of the capital stock of the bank was in a sense involuntary and was to meet an impairment of equal amount. It must be presumed that the Comptroller of the Currency, in estimating and determining the amount of the impairment, considered all of the assets of the bank and that his estimate was based upon what then appeared to be their value, making proper allowance for assets depreciated in value and for those regarded as worthless. . . . . There can be no voluntary withdrawal of any portion of the assets of a bank

where the effect of such withdrawal will be to impair the capital stock or endanger the security of its creditors. On the facts before us, it will be presumed that the reduced capital stock represented the actual value of the remaining assets; *prima facie*, any further withdrawal of assets, whether of great or of little value, would result in still further impairment of the capital."

McCann, Trustee v. First National Bank of Jeffersonville, 131 Ind., 96, 97.

If the rule rests on that foundation, when the foundation is removed the rule falls. If there is any general rule that there can be under no circumstances a distribution of assets when the capital stock is reduced, it is superfluous to support it by any such reasoning as is found in the Indiana cases, but if the general rule is, that where a part of the stockholder's shares are taken from him by the corporation by a reduction of its capital stock (perhaps without his consent) he is entitled to have returned to him an equivalent in the assets of the corporation, then the reasoning of the Indiana Court is pertinent and its purpose can be understood.

In the New York case there was no impairment of capital. The reduction of $200,000 was made with the purpose of distributing $100,000 among the stockholders and adding $100,000 to the bank's surplus. The Comptroller of the Currency imposed no condition and made no order as to the disposal of any assets upon the reduction of the capital stock. The bank not only made no attempt to distribute the $100,000 in dispute, but undertook to withhold it from the stockholders and carry it to the surplus. The dissenting stockholder stood solely upon his right under the law to have his proportionate share of the assets returned to him and the Court upheld his claim.

The shares of stock represents the net actual capital of the bank and when there is no impairment none of the shares of the stockholders should be taken from them, except in exchange for the assets they represent. The New York Court recognized the fact, long well known in the business world, that when a reduction of the capital stock is made the stockholder's reduced hold-

ings will probably not be worth as much as his original holdings. Two shares of a capital stock of $200,000 will bring more in the market than one share of a capital stock of $100,000, although both are based upon the same assets. It is the knowledge of this fact (used in the judgment of many unwarrantably and contrary to the public welfare) which is the explanation of excessive capitalization of corporate assets but whatever may be thought of its use in such cases, the fact remains; and the strictest moralist has never contended that a stockholder in a corporation is under any obligation to suffer a depreciation of his property that the corporation may create a surplus not prescribed by law. The stockholder's proportionate interest may be the same after the reduction as before but the financial aspect of the case is much more interesting to him than the mathematical.

"When the capital stock is reduced, the amount so set free belongs to the stockholders in proportion to the number of shares held by each, and it must be returned to them; it cannot be retained by the bank for a surplus fund or for any other purpose. In this matter the directors have no discretion (Seeley v. New York National Exchange Bank, 8 Daley, 400; affirmed 78, N. Y. 608), and as such capital ceases to be the property of the corporation and becomes the property of the individual stockholders, its retention by the bank cannot be authorized by a majority of the stockholders no matter how large; but each stockholder is entitled to claim his portion and cannot be deprived of this right against his own consent." Pratt's Digest, Ed. 1905, p. 41. See Thompson on Corporations, Vol. 2, Sec. 2118, Cycl. Law and Procedure, Vol. 5, p. 436. Strong v. Brooklyn Cross-Town R. Co., 93 N. Y., 426.

At the time of the reduction of the capital stock of the Second National Bank its net actual capital applicable to stock was, exclusive of the assets in dispute, between $240,000 and $250,000, so that when the reduction was completed the bank had a surplus of between $40,000 and $50,000 without taking the disputed

assets into consideration. These were worth between $20,000 and $30,000. Prior to the reduction, the bank's capital was therefore somewhat impaired, probably to an amount between $30,000 and $40,000.

We have then a case presenting some of the features of the New York case and some of the features of the Indiana case. That is to say we have a reduction of the capital stock, part of which was needed to meet impairment of capital and part of which was not. We submit that so far as the reduction was necessary to meet the impairment of capital, that is to say, to produce an equality between the nominal amount of stock and the net actual capital applicable to stock, there could be no distribution, but that the reduction beyond that amount warranted and required a distribution on the principle laid down in the New York case. We cannot see that the situation is any different from what it would have been if a reduction had first been made sufficient to meet the impairment, and subsequently another reduction had been made. The substantial rights of the stockholders cannot be affected by the method adopted by the bank in effecting the reduction.

The amount of capital stock prior to the reduction, the amount of capital stock as reduced, and the net actual capital of the bank applicable to stock are decisive elements in ascertaining whether any capital is set free. We contend, therefore, that independently of any action of the Comptroller of the Currency, except his approval of the reduction of the capital stock, and independently of any action of the board of directors, the stockholders of the bank of record June 9, 1900, had a right to require a distribution among them in proportion to their respective holdings, of all the net actual capital of the bank in excess of $200,000. The directors of the bank having set aside a part of such excess their action was lawful and the stockholders of June 9, 1900, are entitled to that fund, so far as it has not been converted into cash, and to whatever cash has been realized from the disposition of any part of it.

POINT III.

It was fairly within the authority of the Comptroller of the Currency to condition his approval of the reduction of the capital stock of the bank on the adoption of such measures as he might think proper to do justice to the holders of the original shares. Cogswell v. Second National Bank, 76 Conn., p. 261. This is the language of the Connecticut Court in reference to the power of the Comptroller to require the distribution of the fund in question among the stockholders at the date of the reduction. The facts found show that the Comptroller did make such requirement as a condition of his approval of the reduction. He required a statement from the president and from the directors that that course would be taken, and the vote of the directors of June 27, 1900, was in fullfilment of the promise made by the directors to the Comptroller on June 9, 1900. Of course the promise could not be carried out until after the Comptroller issued his certificate, for until that was done, the reduction of the capital stock was not complete.

The State Court was right in holding that the condition imposed by the Comptroller need not be incorporated in his certificate of approval. There is nothing in the law requiring it to be there, and there is no reason why a condition to be performed after the approval took effect should be there. If the Comptroller had the right to impose the condition he could properly make it known to the bank in any way he saw fit. He could not say in his certificate, that his approval would not be given until after the condition was complied with, because the condition could not be complied with until after his approval was given. Presumably the Comptroller was familiar with the practice of the office, and it is perhaps not going too far to say that his construction of the Act of Congress is entitled to consideration.

POINT IV.

It may be claimed by the plaintiff, Jerome, that the assets should have been set aside by vote of the stockholders instead of the directors. Section 5145 of the Act of Congress provides that "the affairs of each association shall be managed by not less than five directors." The directors of a national bank are the managing body, and the action of the directors of the Second National Bank in this case was simply the performance of a duty imposed upon the bank by the law, and by the Comptroller of the Currency. There was no more occasion for calling the stockholders together than there would have been in the transaction of any ordinary bank business.

We submit that the writ of error should be dismissed for want of jurisdiction or the judgment of the State Court should be affirmed.

HADLAI A. HULL,
FRANK T. BROWN,
Counsel for Defendants.

Supreme Court of the United States.

No. 80.—October Term, 1906.

Franklin S. Jerome, Plaintiff in Error, vs. Charles P. Cogswell, The State Savings Bank et al. } In error to the Supreme Court of Errors of the State of Connecticut.

[January 7, 1907.]

The Second National Bank of Norwich, Connecticut, was a banking association, organized and existing under the laws of the United States, with a capital stock of $300,000.

As stated, in substance, by the Supreme Court of Errors of Connecticut, the directors having voted to recommend a reduction of the capital stock from $300,000 to $200,000, were advised by the Comptroller of the Currency that it would be approved, "provided so much of the amount as is necessary is used to charge off bad, doubtful and unproductive assets, the difference only being paid to the shareholders in cash," and that "the shareholders of a national bank, upon a reduction in capital stock, are entitled to either receive the cash or the charged-off assets, and neither can be withheld without their consent." The Comptroller also informed the president of the bank: "The assets belong to the stockholders of record, and a trust fund must be created, so that those assets may be distributed among the stockholders of record when your capital is reduced." The stockholders, in May, 1900, voted to make the reduction, and the president first, and then the directors, filed with the Comptroller a written statement that "the whole amount of the reduction, viz., $100,000, will be used for the purpose of charging off bad, doubtful and unproductive assets, no money to be paid to the shareholders unless realized from said assets, which are to be set aside and collected for the benefit of the shareholders of record at date of the issuance of the Comptroller's certificate approving the reduction." The Comptroller gave his certificate, dated June 9, 1900, approving the reduction, without any qualifications.

"On June 27th a schedule of certain assets of the bank, each item being given a valuation, and the total valuations of all amounting to $100,307.86, was presented to the directors, who thereupon voted that the assets so scheduled, 'which assets are considered either bad or doubtful, and on account of which the capital stock of the bank has been reduced from $300,000 to $200,000, be set aside from the other assets of the bank and be held by it in trust for the stockholders of record on the 9th day of June, 1900, and that whatever may be realized from said assets be distributed

from time to time as may be reasonable among said stockholders in proportion to their respective holdings on said date.'

"Thereupon the account with capital stock on the books of the bank was credited with a reduction of $100,000, and the items named in the schedule above described were charged to the account of profit and loss at the valuation of $100,307.86. Some of the items were of real estate; the rest were not well secured; and all were those referred to in the directors' statement to the Comptroller dated June 9th.

"This left the bank with good assets worth over $240,000.

"The bank thereafter, until its charter expired in 1903, kept a separate account relating to the assets included in the schedule, entitled 'Stockholders Trust,' in which were credited all collections and charged all expenditures arising in connection with endeavors to realize upon them.

"Two of the scheduled items represented claims for a larger amount; the valuation affixed to each representing the estimated loss upon it. The same claims were also entered in the books of the bank, as part of its remaining capital, at a valuation for each equal to the difference between its face and the valuation assigned to it in the schedule.

"The receiver has received $20,240 on account of the scheduled assets. Some of them also remain uncollected, but have a value. To one of the items, entered as 'Demand loans, E. A. Packer, $15,647.50,' belonged certain railroad stock held as collateral security. A note for over $1,000, made by 'C. P. Cogswell, trustee,' and discounted by the bank to pay an assessment on this stock, was included in the reduced capital of $200,000, and in March, 1903, was paid off from the proceeds of sales of the stock; leaving a balance of such proceeds, which was included in the $20,240 above mentioned.

"All the certificates representing the shares in the original capital were, on or about July 1st, 1900, exchanged by the holders for certificates in favor of each for two-thirds of the number of his original shares."

The charter of the bank expired by lapse of time February 24, 1903, and its affairs were being settled in the manner provided by law, when a complaint in equity was filed by a stockholder in the Superior Court of Connecticut, asking for the appointment of a receiver to wind up its affairs, because of alleged misappropriation, and a receiver was appointed. The receiver filed a petition with the court, stating that in May, 1900, the capital stock of the bank was reduced from $300,000 to $200,000, and that thereupon assets of the face value of $100,000 were charged off and set aside, and that a question had arisen as to whether the proceeds of those assets be distributed to the stockholders of record at the time of the reduction or of the expiration of the charter.

Claims to the charged-off assets by virtue of ownership of original stock when capital was reduced; of such stock, although it had been surrendered and new stock issued; and of stock after the reduction; were filed.

The Superior Court held that those assets belonged to the bank and should be distributed to the stockholders of record at the expiration of its charter.

The Supreme Court of Errors adjudged that the stockholders of record at time of reduction were entitled to the charged-off assets, and reversed the judgment of the Superior Court with directions to distribute accordingly. 78 Conn. 75.

Whereupon this writ of error was brought.

Mr. Chief Justice FULLER delivered the opinion of the Court:

This is not a case involving the rights of creditors or of minority stockholders as such, but a case raising the bare question to whom assets remaining on a valid reduction of the capital stock of a national bank belong.

The National Banking Act (Title LXII, Rev. Stat.) provides:

"SEC. 5143. Any association formed under this Title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this Title to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained."

The reduction in this case was accomplished at a time when the bank was not being wound up, by the required vote of the stockholders and with the approval of the Comptroller of the Currency, and the new shares on the basis of the reduction were accepted by all the stockholders.

The bank was left with good assets of more than $240,000, or, in other words, with an unimpaired capital stock of $200,000 and a surplus of twenty per cent, that is, $40,000, exclusive of the assets, the distribution of which is the matter in controversy. These assets were set apart in compliance with the requirement of the Comptroller that certain bad, doubtful and unproductive assets should be charged off or set aside for the benefit of those who were stockholders at the date of the approval. This requirement, though not stated in the certificate of approval, was evidently, on the facts, made a condition thereof and presumably in accordance with the practice of the Comptroller's office, and was imposed to the end that justice might be done to the owners of the original shares.

It is said that the original capital of the bank of $300,000 was impaired prior to the reduction, say to the extent of $30,000, as shown by adding to the $240,000 the value of the scheduled assets, estimated at $30,000.

As a general rule, it may be admitted that where capital stock is impaired and a reduction is made merely to meet that impairment, there can be no distribution. But that is not this case, in which the stockholders of record June 9, 1900, had a right to require a distribution among them of an excess upon reduction in proportion to their respective

holdings. In the language of the Connecticut Supreme Court: "The right to receive what might ultimately be realized from the fund thus set apart became therefore irrevocably vested in those who were shareholders on June 9, 1900, and they or their assigns are now entitled to whatever is to be distributed from it."

It follows, as held, that the transfer of shares after the reduction of June 9, 1900, did not carry any right to an interest in the special trust fund, the proportionate interests therein having vested in the then shareholders as individuals. The result is unaffected by the fact that distribution in cash may have been contemplated as the assets set aside were realized upon.

The conclusion at which we have arrived dispenses with the necessity of discussing other questions suggested.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court U. S.

END OF CASE